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U.S. WEAPONS TECHNOLOGY AT RISK: THE STATE DEPARTMENT'S PROPOSAL TO RELAX ARMS EXPORT CONTROLS TO OTHER COUNTRIES

MAY 1, 2004

REPORT

OF THE

COMMITTEE ON INTERNATIONAL RELATIONS

OF THE

UNITED STATES
HOUSE OF REPRESENTATIVES

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Congress of the United States

Washington, DC 20515

May 1, 2004

LETTER OF TRANSMITTAL

The Honorable J. Dennis Hastert
Speaker of the House of Representatives
H-232, The Capitol
Washington, D.C. 20515

Dear Mr. Speaker:

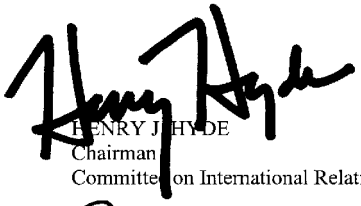
We transmit, herewith, a report of the Committee on International Relations, which has been endorsed by the Chairman of the Committee on Armed Services, concerning the Department of State's proposal to enact a new law that would suspend the U.S. Government's system of prior scrutiny and control over weapons technology exported through commercial shipping channels from the United States to private companies in the United Kingdom and Australia. We find this proposal, as currently contemplated, to be fundamentally inconsistent with U.S. security interests in the post-September 11th security environment, where the risks and consequences of weapons falling into dangerous hands have increased, not decreased.

Distinguished House colleagues in the 106th and 107th Congresses who examined previous versions of this proposal, prior to the attacks of September 11, 2001, found that it should be approached with an abundance of caution and skepticism due to the inherent risks (and a recent history involving Canada) of unlicensed U.S. weapons technology being diverted to criminal enterprises operating on behalf of state sponsors of international terrorism. The current proposal from the State Department does not mitigate those concerns, but renders them even more acute. The weapons to be deregulated are not, as has been represented, those of "low sensitivity," but involve many lethal items, including terrorist weapons of choice. It would be most unwise, in the name of an initiative launched by the previous administration (before 9/11) to liberalize weapons exports, for the United States to now assume additional and unnecessary risks to our security in the midst of a war on terrorism.

We are persuaded that this is a moment in our Nation's history to strengthen, not relax, export controls over all weapons technology – not only weapons of mass destruction (the ultimate weapons which terrorists seek), but also conventional weapons and munitions, which our enemies are already using against our civilians and U.S. servicemen and women. Indeed, a policy to relax weapons export controls seems unhinged from U.S. counterterrorism and non-proliferation policy. The United States needs to provide international leadership with our friends and allies in the war on terrorism in an effort to strengthen, not weaken, export controls in these areas.

We continue to hope that the State Department will modify its approach to these matters to meet the national security concerns we have identified. Thank you for your immediate consideration of our report.

Sincerely,



HENRY J. HYDE
Chairman
Committee on International Relations

TOM LANTOS
Ranking Democratic Member
Committee on International Relations

DUNCAN HUNTER
Chairman
Committee on Armed Services

Introduction

This report examines the major issues and implications for U.S. national security and foreign policy in the post 9/11 security environment of the Department of State's proposal to enact a new United States law, which would permit private persons in the United States to export weapons and other defense commodities to companies in the United Kingdom and Australia, without first: (1) receiving a U.S. Government munitions export license, and (2) undergoing the scrutiny and vetting of all involved parties—steps (along with others) that otherwise precede the commercial export of weapons technology from the United States through the export license application process in accordance with the Arms Export Control Act. The State Department proposes that a new law be enacted because arrangements it negotiated with the United Kingdom and Australia pursuant to an export control "reform" initiative of the previous administration do not meet the requirements of existing United States law governing establishment of such an exemption. These requirements are found in sections 38(f)(2) and (j) of the Arms Export Control Act (22 U.S.C. § 2778(f)(2) and (j)). They were established by section 102(a) of the Security Assistance Act of 2000 (Public Law 106–280). Under State's proposal, the Executive Branch would be given authority in a new law to waive these requirements and then proceed to establish an exemption in regulation.

The State Department initially proposed new legislation in the first session of the 108th Congress in connection with consideration by the Committee on International Relations of the State Department Authorization Act for Fiscal Years 2004–2005. At that time (April 2003), State explained the problem with Public Law 106–280 was that it required commitments by other countries that were "too strict or specific."[1] In State's analysis, it would be better for Congress to enact a new law that would permit the Executive Branch to waive any requirements in section 38(j) that would encroach upon giving State "latitude to conclude the best agreements that are achievable and that represent in its judgment sufficient significant improvements in a country's . . . regime so as to justify an exemption." State's proposal is not limited to the UK and Australia, but is potentially applicable to any country.

However, the Committee deferred action on State's proposal. Chairman Hyde wrote to Secretary Powell on May 5, 2003, explaining why: "any change in law such as that proposed in the Department's draft legislation should only be undertaken, if at all, following careful consideration by the Congress of all relevant facts, including a full understanding of the details of the negotiations to

[1] April 1, 2003, Department of State Sectional Analysis, Sec. 603, p. 19.

date, and how the Administration might use any changes in law to establish more exemptions, in addition to what is contemplated for Australia and the United Kingdom."[2] Accordingly, the Chairman's letter requested that the Department furnish the Committee with copies of the arrangements that had been negotiated and other documentation needed to form an opinion about the State proposal.

In making this request, Chairman Hyde also expressed support for deepening defense cooperation with "two of our closest allies" and explained that the Committee would consider other appropriate ways to facilitate bilateral cooperation when taking up the State authorization bill, without prejudice to the possible eventual enactment of changes in law that would permit the exemptions following careful study. Chairman Hyde and Ranking Member Lantos subsequently sponsored legislation (H.R. 1950), since passed by the House, containing a provision (section 1204) that would require "fast track" munitions licensing at the State Department for commercial defense trade with the UK and Australia on the grounds that our closest coalition partners in the war on terror should be accorded the highest priority in our export licensing process. State "strongly" opposed fast track licensing for the UK and Australia as unnecessary, noting that it was already processing license applications for the two countries in under 10 days. But the Committee's analysis of licensing data subsequently made available by State suggests that hundreds of licenses for the UK and Australia were not processed in under 10 days, and that the provisions of section 1204 are quite necessary.[3]

By the same measure, Chairman Hyde's letter also underlined the Committee's growing concern with the apparent trend towards relaxation of controls over munitions and other arms-related exports, describing this trend as one "that seems unwise and particularly incongruous with the increased threats to U.S. security and foreign policy interests since the attacks of September 11, 2001."

This report draws on the documentation provided by State in response to the Chairman's May 5th letter and to a subsequent letter dated June 25th, in which a number of questions were presented concerning various matters affected by the proposed arrangements. The report also draws on the legislative history related to the Security Assistance Act of 2000, relevant communications between Congress and the Executive Branch associated with that Act, and other documents in the public domain.

The State Department has provided considerable—but not all—information requested by the Chairman as of the time of final preparation of this report. Certain information that is essential to a full understanding by Congress of the country exemption issue has not been forthcoming. In particular, State has not provided the description first requested in the Chairman's May 5th letter of how the

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[2] This concern continued throughout the first session of the 108th Congress as State repeatedly declined to rule-out establishing exemptions for other countries.

[3] For example, in fiscal year 2002, approximately 850 export license applications for the UK and Australia, which involved weapons categories that have long been eligible for license-free export to Canadian industry, were inexplicably referred by State to DoD for a national security review after evaluation of the application and vetting of the involved parties. but before approving the license. Such referrals typically add a minimum of 4 weeks to the license process. As surprising, more than 60 percent of the nearly 850 cases were only approved with provisos (i.e., specific conditions or limitations to which the license is subject), though the same exports to Canadian industry would contain no such provisos (there being no license in the first place).

requirements of section 38(f)(2)(B) will be met, with respect to a determination required by the Attorney General regarding the ability of the United States to detect, prevent and prosecute criminal violations of the Arms Export Control Act, including efforts linked to international terrorism. The Department responded to some questions raised by the Chairman in his June 25th letter related to law enforcement interests and to the scope of the UK and Australian munitions lists only in the final days and weeks of the first session of the 108th Congress, though it indicated that this information would be forthcoming at an earlier date. The Committee has received excellent cooperation from the British and Australian Embassies in Washington for which it is grateful.

The analysis of issues and implications of State's proposal contained in this report is not an explication of all such matters, but only those that are of a fundamental character with respect to United States interests.

Summary of Findings

- There are inherently greater risks of diversion associated with unlicensed commercial exports of U.S. weapons and other defense commodities, as manifest in the 1999 review of the Canada exemption.[4] Congress highlighted these risks to the Executive Branch well before the terrorist attacks on New York and Washington of September 11, 2001. Congress also expressly cautioned against using the authority provided in the Security Assistance Act of 2000 to negotiate "Canada-like" exemptions with the United Kingdom and Australia because of the additional risks associated with commercial air and sea cargo transported over much longer routes to those countries. These repeated cautions, however, have gone unheeded.
- The risks of diversion—and their potential consequences—have increased (not decreased) since the attacks of September 11th, as the global war on terrorism continues across a variety of fronts. Criminal investigations by U.S. law enforcement agencies since September 11th provide compelling evidence of these risks, as well as vivid, contemporary reminders that our closest allies are as susceptible as the United States (and probably more so) to illegal arms activities that threaten our mutual security and foreign policy interests.[5]
- By eliminating on the U.S. side nearly all critical elements of prior U.S. Government scrutiny and control that would otherwise

[4] In April 1999, the U.S. Government suspended in part a similar exemption for Canada after front companies in Canada operating in the interests of Iran, Libya, Sudan, the People's Republic of China and other U.S. embargoed countries had extensively exploited the liberal regulatory environment to acquire U.S. weapons technology. The Canada exemption and the weapons diverted are discussed later in this report. For a fuller review of the specific enforcement cases identified publicly in 1999, see also Appendix II to GAO's Report (GAO–02–63), "Summary of Enforcement Cases That Supported Need for Change in the Canadian Exemption."

[5] For example, the December 2003 indictment in U.S. District Court of a UK national arrested in Newark last summer by the FBI Joint Terrorism Task Force on charges related to the sale of shoulder fired missiles to terrorists in order to shoot down commercial airliners, and the July 2003 announcement by the Department of Homeland Security of search warrants executed in ten U.S. states relating to a probe into a front company headquartered in London which procures arms for Iran. In addition, the State Department's own reports to Congress since 9/11 dealing with end use monitoring of U.S. weapons technology exported abroad have also emphasized an increase in suspicious arms activity in Europe.

precede the export of weapons and defense commodities from the United States, the arrangements negotiated by the Department of State will almost surely enlarge these risks. State's approach would suspend the statutory framework that requires the identification of all parties (the applicant, the freight forwarders, the intermediate consignees and the end user) on a license application for the purpose of preventing the involvement of ineligible, unreliable or suspect persons, in favor of a "one-time" vetting of only the end user. U.S. law has long provided for the vetting of *all* parties precisely because illegal traffic in arms is a complex criminal enterprise in which a single diversion may involve an array of brokers, middlemen, banks, transportation companies and transshipment points—as most recently reflected in the shadowy network reportedly utilized for illegal shipments of nuclear materials and equipment by A.Q. Khan, which remained undetected for many years. While State contends the United States would not give up that much in suspending this framework because "not all" unscrupulous middlemen are on its computerized watch list, the Committee does not share this sentiment. On the contrary, this line of argument will likely be of little consolation if U.S. weapons are diverted through the involvement of persons known to be engaged in criminal activities, whose roles were only discovered after the fact because routine computer checks were not conducted.

- The risks of diversion can only partially be mitigated by an effective export control system of a friendly foreign government, even one that is fully "comparable" in effectiveness (as required under current law) to that of the United States (which is not the case here). This is because a foreign government's system generally has operational effect only after U.S. weapons technology shipped commercially has entered its jurisdiction—i.e., near the end of the journey. The risks associated with the particular arrangements State has negotiated may be further accentuated by: (1) the apparent absence of transshipment controls in the UK for most conventional weapons technology;[6] and (2) State's apparent failure to consider the possible effects of a broad exemption on targeting and screening of weapons exports by Homeland Security personnel at U.S. ports of exit in the post-9/11 environment (where U.S. border personnel are already fully engaged in stepped-up efforts to prevent the *entry* of dangerous goods).[7] While U.S. border officials have worked effectively since 9/11 to

[6] A license is not required for the majority of transshipments through the UK from one country to another. Most other transshipments can be made under one of the Open General Transshipment Licenses. Open General Licenses allow the export of many controlled goods by any exporter, removing the need for exporters to submit a license application provided various conditions are met (e.g., no WMD, the country is not subject to an EU arms embargo, etc.). See the Guidelines for an Open General Transshipment License at the UK Department of Trade and Industry Internet site: *www.dti.gov.uk/export.control/ogelicences.htm*

[7] On November 17, 2003, the Department of Homeland Security informed the Committee that, depending on the volume of exempt military cargo, the proposed exemptions could "increase or significantly increase the workloads and require additional inspectors. To automate the processing of electronic export information via the Automated Export System (AES), programming changes and funding . . . will be required." In the same letter, DHS advised that State still has not updated its guidance to Customs concerning inspections of license free weapons exports along the Canadian border as recommended by GAO in its March 29, 2002 report entitled "Lessons to Be Learned from the Country Export Exemption." (GAO–02–63).

close the "front door" to imports of dangerous items, State's proposal would open the "back door" for export of such items.

- The unlicensed exports that would be susceptible to increased risk of diversion are *not*, as has been repeatedly described by the State Department, merely those of "low sensitivity," but comprise an impressive array of lethal munitions, including shoulder-fired missiles, bombs, military explosives, operational flight trainers, body armor, and other articles which would figure prominently (and in some cases already have) in the illegal acquisition plans of foreign terrorist organizations, state sponsors of international terrorism, or their brokers. State's proposal to relax export controls over such terrorist weapons of choice seems incongruous with increased threats to U.S. security in the post-9/11 environment and reinforces the perception that State's arms export control policy has become unhinged from U.S. counter-terrorism and non-proliferation policy as a consequence of its singular focus on export control "reform". This policy emphasis is also inconsistent with initiatives undertaken by President Bush to tighten controls, including the Container Security Initiative, the Proliferation Security Initiative and, the "STAR" ("Secure Trade in the APEC Region) initiative, which calls for strict—not relaxed—export controls on items such as shoulder-fired missiles (or "MANPADS"[8]). Other U.S. weapons technology that would be exempt from export licensing include many items having substantial combat utility, and numerous others which, at higher performance levels, are specified on the Militarily Critical Technologies List ("MTCL") because of their importance to maintaining war fighting superiority for U.S. forces. While State's proposal would exclude from the exemption some weapons that might present a technological challenge to U.S. armed forces on the battlefield, a conventional battlefield (as noted by the Chairman and the Ranking Member in a recent letter to the Secretary of State) is not where and how our enemies in the war on terror are waging their attacks against the United States and our coalition partners.[9]
- The proposed arrangements fall far short of the laudable goals established by Secretary Cohen in the previous administration of using country exemptions to negotiate "ironclad" arrangements covering key areas of military export controls, such as re-transfers and end use, in order to provide a "dramatic increase in our global technological security."[10] In fact, the texts State negotiated with the UK and Australia do not contain *any* commitment by either government to seek the prior written consent of the U.S. Government before it re-exports to another country weapons technology it has received from the United States. The decision by the UK not to agree to the U.S. Government's right to consent to re-transfers and changes in use of U.S. weapons, but only to give "fullest weight" to such interests—and to relegate this fundamental U.S. interest to a civil contractual arrangement between the UK and its firms that is mainly enforce-

[8] Man Portable Air Defense Systems.
[9] See Appendix 15.
[10] Letter dated June 18, 2000, from Secretary Cohen to Chairman Gilman, Committee on International Relations (see appendix to this report)

able under English common law—is not only disappointing, but potentially highly prejudicial to United States interests around the world, should this be seen as a precedent for other governments to downplay the U.S. Government's consent rights. It is difficult to understand the UK position (and the State Department's acceptance of this proposed outcome) in light of a well-publicized defense cooperation treaty the UK recently ratified, which accords to its European partners essentially the same right of prior written consent for their "commercially" sensitive information that was withheld from the United States (apparently on grounds of "extraterritoriality") for U.S. Government controlled national security information.[11]

- Expanded cooperation with both countries in law enforcement matters is desirable and helpful, if fully implemented (particularly inasmuch as there have been few successful prosecutions in the United States of arms export control violations in circumstances where no export license was required). But, in the case of the UK, this cooperation appears to be mainly discretionary, since many areas will not involve dual criminality (a predicate for "required" cooperation under the arrangement), but will come under the aegis of the civil contractual arrangement, noted above. Persons who may willfully violate the civil contract for the most part will not be subject to the sanctions of a UK criminal court, but face only prospects of a civil fine. Even assuming full cooperation by UK authorities, this effort is generally directed to detecting violations *after* they have occurred, rather than preventing them in the first place. U.S. arms export control policy would undergo a fundamental shift away from the "prevention" of unauthorized exports and towards greater dependency on the cooperation of foreign governments to obtain and provide evidence needed to support successful prosecutions. As the Department of Justice predicted in commenting on country exemptions well before 9/11, "our first line of defense against diversions would be moved across the oceans to England and Australia." [12]
- The UK system, despite a partial closing of gaps in some areas (e.g., brokering and "intangible" transfers, in part), will generally *not* be comparable to the comprehensive system deployed by the United States (other than in the area of weapons of mass destruction and other limited areas), but will remain a "targeted" system. Instead, the UK system for military export controls will more closely resemble the U.S. Department of Commerce's system for dual use export controls (except that the U.S. dual use system controls intra-U.S. transfers of technology to foreign nationals, while the UK system will not). Even in those areas where the UK is extending coverage of its system (e.g., brokering, "intangible" exports), continued reliance on "open" licenses (self-validating by the exporter) will be the hallmark. The

[11] See article 52 of the Framework Agreement Between the UK, France, Germany, Italy, Spain and Sweden concerning Measures to Facilitate the Restructuring and Operation of the European Defence Industry. Done at Farnborough, UK July 27, 2000; entered into force April 18, 2001.

[12] Letter dated April 27, 2000, from Deputy Assistant Attorney General Swartz, Criminal Division, Department of Justice to Senior Adviser Holum, Department of State. The text of this letter was made publicly available by the Center for Strategic and International Studies on its Internet site. *www.csis.org/export/ltrholum.htm*

UK is implementing certain changes to its system in response to the recommendations of Lord Scott's inquiry into the sale of UK defense technology to Iraq prior to the first Gulf War, and consistent with commitments it made in the G–8 and European Union. But, the UK also appears to have decided that it would not make other changes to its laws or regulations in order to ensure that the U.S.–UK arrangement in this area was compliant with U.S. law. Australia's future export control system is still being debated internally. Little is known about its details. State advises there are certain areas Australia does not plan to control in order to meet requirements of U.S. law, but others where it may be willing to, provided the U.S. Government changes its law so that an exemption could be granted. Moreover, while seeking expansive authority to waive most requirements in existing U.S. law, State appears to misconstrue other requirements in U.S. law in order to assert "comparability" for both the UK and Australian exemptions.[13]

- It is clear that the United States offer of a country exemption has not provided a "powerful incentive" (the stated rationale for the exemption policy) for these countries to strengthen their military export control systems to a level comparable to that of the United States.[14] This development impeaches the original justification for the exemption policy. Yet, neither this development nor others, including the global war on terror, has prompted any serious re-examination to date of State's policy in this area. State's posture of declining to rule-out additional exemptions for other countries suggests that the inter-agency export control bureaucracy remains fundamentally fixated on a policy that began before 9/11 of liberalizing commercial weapons exports in response to globalization. The so-called "bargain" conceived in the previous administration by which the United States would relax its military export controls in most areas as an inducement for other governments to raise their controls has, in fact, not worked out according to plan. In the post 9/11 international security environment, it is reasonable to question why State feels our friends and allies require "incentives" from the United States to close gaps in their controls over weapons technology, and whether it is wise for the United States to continue a policy of weakening and bargaining away its military export controls in exchange for incremental changes in other countries' controls.
- By failing to heed Congress' admonition not to negotiate "Canada-like" agreements, the State Department appears to have fashioned arrangements that are high on risk and low on tan-

[13] For example, there is no obvious reading of the requirement in section 38(j)(2)(A)(iv) requiring "establishment of a list of controlled defense items to ensure coverage of those items to be exported under the exemption" that would permit the conclusion that coverage of a U.S. Munitions List item exported under the exemption could be achieved if the item is *not* on the foreign government's list of controlled *defense* items. Yet, in the proposed exemption arrangements with the UK and Australia, State seems to assume this requirement is met in some cases (specified in the UK agreement, but unspecified in the Australia agreement) if the U.S. Munitions List item is on the foreign government's list of controlled *dual-use* items.

[14] June 28, 2000, Letter from Secretary Cohen to Chairman Gilman.

gible benefits, both to the United States and our closest allies.[15] References to improved interoperability and coalition war fighting as a result of the license exemptions seem to be essentially rhetorical, and not demonstrable. In the final analysis, the commodities that would be shipped license-free are as easily—and more securely—acquired by the UK and Australia through issuance of a munitions export license to U.S. suppliers in a time frame that varies (according to relative urgency) from 24–48 hours at one end, to less than 10 calendar days for routine transfers.[16]

- While State continues to oppose provisions in H.R. 1950 (passed by the House in the first session of the 108th Congress) that would establish rapid export license processing for the UK and Australia, it inexplicably referred approximately 850 arms export license applications for the UK and Australia to the Department of Defense for national security review during fiscal year 2002 involving weapons categories that would not even require a license if an exemption were established. Such referrals typically involve much longer processing times of 4 to 6 weeks (8 days versus 48 days according to State's published timelines for fiscal year 2003). It is not easy to understand why 850 weapons technology exports available to Canadian industry for many years without any U.S. Government review, still require lengthy inter-agency review on national security grounds before being made available to our closest allies in the war on terror. Nor is it easy to understand why 60 percent of those exports that were ultimately approved to the UK and Australia contained specific conditions or limitations on the licenses (while exports of the same weapons commodities to Canada involve no such conditions or limitations).[17] Because State's conflicted position in this matter impedes legitimate exports by U.S. firms, and presents the UK and Australia with a Hobson's choice between no license and one that takes 48 days to obtain, it is little wonder that both strongly favor the first of these options.
- The Committee is well aware of pressure mounted on State in recent years by our European allies to make the U.S. arms export control system less restrictive in order to help them fulfill the defense and foreign policy commitments of the European Union (EU) and the North Atlantic Treaty Organization (NATO), which they are having difficulty meeting because of flat (or declining) national military budgets.[18] Reflecting its strong bias towards deepening trans-Atlantic defense cooperation by appropriate means, this Committee has repeatedly urged greater prioritization and expedition in licensing exports to NATO allies

[15] It is notable that there is essentially no reciprocity in either bilateral agreement: The U.S. exemption would be unilateral in nature. Both Australia and the UK would continue to maintain existing license requirements on their own military exports to the United States.

[16] About 70 percent of all U.S. munitions export license applications are currently processed within this 10 calendar day window as a direct result of additional funding and personnel resources Congress provided to State (which did not request these increases) in FY 1999. By comparison, the UK's target is to process 70 percent of its munitions cases within a 20 working day period.

[17] See the discussion of licensing data for FY 2002, annexed to the July 25, 2002, letter from Assistant Secretary Kelly to Chairman Hyde.

[18] The same pressure produced the DTSI policy in the previous administration, of which the proposal to exempt countries from U.S. export license requirements is one component.

and our coalition partners, and has provided State all of the resources it needs to do this. The Committee has also been flexible in approving major cooperative projects in recent years in the face of serious questions about the efficacy of our partners' controls. One example is the Joint Strike Fighter program, where the chief medium for export is by computer network, notwithstanding the absence of laws in most partner countries that would provide full protection for such exports. At the same time, it is perfectly reasonable for the United States to want our European allies to: (1) strengthen their arms export controls consistent with the increasingly advanced level of technology being shared with them; and, (2) respect those U.S. requirements (such as prior written consent to third party transfers) that are fundamental under our laws. Unfortunately, below the rhetorical level, the Committee sees little evidence of a serious effort by State to engage our European allies on these important questions. Instead, all indications suggest an unwavering policy to relax U.S. controls in order to establish commonality with European standards—an approach which the Committee finds unwise, as well as inexplicable, in the context of the global war on terrorism.

- The agreements would cover most unclassified exports to the two countries (as described by State), which effectively means the elimination of U.S. Government licensing for up to 20 percent (measured in value) of all U.S. weapons technology currently licensed for export on an annul basis.[19] This would appear to be the single largest deregulatory measure related to armaments involving any country in modern history. It is not obvious to the Committee why it is appropriate for the United States to seek such a distinction at this time in our Nation's history. Given the fiercely competitive nature of the international arms market in which the United States currently holds the largest share, the possibility that other governments might view such a relaxation of controls by the United States as commercially motivated, and as providing a pretext for relaxation of control over their sensitive exports must also be taken into consideration. Similarly, having appropriated substantial funds over the past decade on a bipartisan basis for export control related assistance to other countries so they might strengthen their export control systems, it is reasonable for Congress to consider the apparent contradiction between U.S. exhortations and assistance to other countries to strengthen their weapons export controls and State's proposal to relax U.S. controls.
- Importantly, the United States may be squandering a unique opportunity to establish significant bilateral agreements with our closest military allies, which not only set a high standard for other countries to follow (a goal which seems axiomatic in the context of the war on terror), but which also provide a more appropriate framework for bilateral defense cooperation with these countries. That cooperation is increasingly focused, not on the list of commodities contained in the Canada exempt list, but on

[19] If extended to all NATO countries as originally envisaged by State (a position which State explicitly preserves by declining to exclude other country exemptions), unlicensed U.S. weapons exports could approach $8–10 billion per annum or 60–70 percent (by value) of all commercial weapons exports from the United States.

defense services related to cooperative research projects in high priority areas, such as missile defense.[20]

- The Congress' options are increasingly constrained by the failure of the Department of State to keep it informed of the actual details of the agreements at an earlier date—including its decision to pursue a substantially different approach than authorized under U.S. law[21]—and by the now well-established perception in London and Canberra that conclusion of the agreements, whatever their shortcomings, has become symbolically important to their relations with the United States. Instead of putting these negotiations on hold in order to consult with Congress when it became clear the UK and Australia could not meet U.S. legal requirements, the Department apparently decided to wrap up the negotiations and present Congress publicly with the requirement for a new law which, if enacted, would jeopardize U.S. interests, but which if not enacted would disappoint our closest allies.
- This report, however, stops short of recommending possible legislative approaches to correct numerous infirmities in State's proposal and merely distills those issues that appear to merit consideration by Congress in deciding whether, and if so how, to fashion a new law that would authorize an exemption. An underlying question prompted at almost every juncture in the State proposal is whether, in the name of an initiative launched in the previous administration to liberalize arms export controls before 9/11, the United States should now, in the midst of the war on terror, assume additional risks, particularly when it is clear that the weapons involved can be as quickly and more securely provided by accelerated licensing procedures that give top priority to our closest allies in the war on terror.

Background

Purpose of U.S. Military Export Controls

The central purpose for U.S. Government control over the export of weapons and defense commodities by private firms is to help ensure that such items, when transferred abroad for use by our friends and allies, do not fall into dangerous hands, either during the course of the original shipment or, thereafter, through subsequent re-transfers or use involving third parties, including third countries (for which third party transfer or use U.S. Government consent is required). The principal means for carrying out this control is the munitions export license system, a relatively stringent (by but no means foolproof) system of prior scrutiny and safeguards

[20] U.S. defense services exported to the UK in FY 2002 outpaced defense commodities by a factor of nearly 3:1: $6.6 billion versus $2.5 billion, reflecting a trend that has dominated U.S. defense trade since the early 1990s.

[21] The State Department acknowledges that it decided to pursue a "different" approach in the case of the UK. That approach for all intents and purposes implied a radical revision of the country exemption policy of offering an exemption only where there was a legally binding international agreement incorporating a foreign government's commitment to change its national laws and regulations where needed to provide controls comparable in scope and effectiveness to the U.S. Government's controls over *all* exports. The "different" approach would be to offer the exemption in exchange for a commitment merely to give "full weight" to U.S. views (but not to obtain U.S. approval)—and this watered commitment could take other forms (e.g. political, civil), and be mainly limited in applicability to "exempt" (not all) items.

whose most significant features are mandated by law in various provisions of the Arms Export Control Act. The system is comprehensive in scope and in application; it includes case-by-case processing of license applications for all items on the U.S. Munitions List that are intended for export to any destination. This permits the U.S. Government to pursue its global interests in ways that protect not only the most advanced military systems critical to assuring U.S. combat superiority, but also to control the supply of spare parts and components in support of U.S. unilateral sanctions and UN Security Council arms embargoes, as well as other U.S. security and foreign policy interests, including nonproliferation and regional security interests, around the world.

Globalization

Globalization of the defense industry provided an overall context for the DTSI initiatives and the country exemption proposal, in particular. Several related factors had combined during the mid to late 1990s to prompt increasing criticism from U.S. and European aerospace companies that the munitions export license process had become an impediment to legitimate transatlantic defense trade. This criticism was levied with increasing frequency after the investigations into illegal technology transfer to China's space launch program, the publication of the House Select Committee's Report ("Cox-Dicks"), and the legislatively mandated return of communications satellite exports from Commerce to State licensing jurisdiction.[22]

License processing times were said by industry to be unacceptably high, and the Department of Defense identified a list of cases that it said validated industry concerns.[23] The nature of U.S. defense trade had also begun to change following the end of the Cold War, with a shift away from the supply of finished military products to European allies and towards increasing emphasis on collaborative research and joint ventures, which emphasized technology transfer (including through industrial offset arrangements) and industry work share. This trend was fueled in part by a decline in military budgets across Europe (or in some cases maintenance of military budgets at very low levels in order to fund commercial R&D), and a shake out in European defense and aerospace industry, which became increasingly concentrated in a smaller number of large trans-European companies, formed in part in order to compete with the major U.S. defense firms. Congress responded

[22] European aerospace interests were directly affected by these U.S. developments on two levels. First, European companies had also participated in the Chinese launch failure investigations along with U.S. counterparts, though not in apparent violation of their own government's export control laws which, unlike the United States, generally do not control the conduct of their nationals in providing technical assistance to space launch vehicle (SLV) programs. Second, the transfer of satellite jurisdiction to U.S. Munitions List control was viewed as incompatible with the more liberal control philosophy for communications satellites and foreign SLV programs in Europe—and a potentially serious impediment both to continued European interest in space technology cooperation with China (not only in communications satellites, but also in other areas such as global positioning satellites) and to trans-Atlantic cooperation in the satellite industry.

[23] Congress requested the General Accounting Office to establish the true facts about these criticisms and a subsequent audit and report by GAO found that license processing times at State actually were similar to Commerce's dual-use license system, and that DoD had exaggerated problems related to the cases on its list, while that list, itself, was actually provided to DoD by a local trade association of aerospace companies. See GAO 01–528 ("Export Controls: State and Commerce Department Licensing Times are Similar").

to these concerns by effectively doubling the resources available to the State Department office charged with the licensing duties in order to accelerate processing of legitimate arms transfers (though no such funds had ever been requested by State for this purpose).

Early Congressional Opposition to "Country Exemptions"

The proposal to establish "country" exemptions was one in a series of initiatives (referred to as the Defense Trade Security Initiative or "DTSI") announced by the Clinton Administration in May 2000 by Secretary Albright at a meeting of NATO foreign ministers. The proposal envisaged the elimination of U.S. Government export licenses for most commercial arms transfers to Australia and any member country of NATO (later expanded to include Sweden) provided that the country enhanced its national export control system such that it was comparable in scope and effectiveness to that of the United States. Congress welcomed many of the DTSI initiatives (a number of which reflected ideas it had previously urged in order to expedite licenses for legitimate defense trade with U.S. allies), but expressed serious reservations about country exemptions. Even prior to the May 2000 announcement, the Chairmen and Ranking Members of the Senate Committee on Foreign Relations and the House Committee on International Relations wrote to Secretary Albright on March 16, 2000, to "make clear (their) adamant opposition:"

> "We believe that the AECA provides the appropriate structure under which the United States should continue to advance our foreign policy, national security and nonproliferation interests. State Department regulations and practice in implementing U.S. munitions laws, including the AECA, have long provided for individual, case-by-case licenses for defense exports. Yet, we understand that proposed exemptions, if extended as planned for NATO and other non-NATO allies, would exempt about 80 percent of commercial defense trade from licensing. Such exemptions are fundamentally inconsistent with the licensing scheme required by the AECA, and the legislative intent underlying the same." [24]

At the heart of Congressional opposition—even prior to 9/11—were concerns that such proposals "not result in additional diversions of technology" and "not weaken, generally, enforcement of export controls and, specifically, the ability of the United States to prosecute and extradite persons that violate U.S. export control laws.[25] Twelve months earlier, in April 1999, State had suspended operation of a similar exemption for Canada in the face of a series of cases demonstrating that the liberalized export control arrangement for that country had been readily—and pervasively—exploited by front companies and illicit arms dealers operating in the interests of state sponsors of international terrorism and other governments prohibited by U.S. law from receiving U.S. weapons and defense commodities (e.g., Iran, Iraq, Libya, Sudan and the Peo-

[24] Letter dated March 16, 2000, from Chairmen Helms and Gilman and Ranking Members Biden and Gejdenson.
[25] Ibid.

ple's Republic of China). Some of these conspiracies were successfully intercepted; others were not.

Department of Justice Concerns

Unknown to Congress at that time, its doubts about the wisdom of the country exemption initiative were being echoed in even stronger terms by the Department of Justice. An April 27, 2000, letter from the Criminal Division to the State Department expressed concern about the proposal and noted that "it will facilitate efforts on the part of counties and factions engaged in international terrorism to illicitly acquire sophisticated U.S. weaponry." The letter warned:

> "[W]e are concerned that the exemption will prompt foreign terrorist groups and other potential adversaries to set up storefronts in England and Australia in order to take advantage of the relaxed export control requirements. We have seen this happen in Canada, a country already exempt from most U.S. export license requirements. England and Australia are not contiguous with the United States and likely would be viewed by hostile elements as being even more attractive locations from which to stage an illicit procurement effort." [26]

The DTSI Proposal

Despite Justice Department concerns (and others reportedly held by the Secretary of State), the previous administration decided to proceed with the country exemption proposal as part of its DTSI Initiative in May 2000. In the run up to the NATO meeting in which the initiative was announced, Secretary Cohen elaborated on the rationale for the proposal:

> ". . . Negotiation of a 'Canadian-like ITAR exemption' with the UK and Australia . . . will expand the consensus (on technology control and, in particular, on third-party transfers) with these key allies . . . create incentives for other countries to also improve their export controls, and allow us to redirect resources from low-risk to high-risk transfers. . . . In fact, the proposal would require legally binding agreements with the UK and Australia on tight third party retransfer controls and closure of other gaps. This strengthened retransfer control would extend to UK and Australian end-users for all US Munitions List items, not only items entering the UK and Australia under the proposed exemption. Our proposal would dramatically improve our control of third party re-transfers, further enhancing national security." [27]

The Security Assistance Act of 2000

Congress eventually authorized the negotiation of the proposed agreements when enacting the Security Assistance Act of 2000, while setting forth specific criteria that would have to be met and duly reflected in the international agreements, as well as changes, where needed, in national export control laws and regulations in

[26] Letter dated April 27, 2000, from Deputy Assistant Attorney General Swartz to Senior Adviser Holum.
[27] Letter dated May 5, 2000, from Secretary Cohen to Secretary Albright.

order to ensure comparability with the U.S. system, and the continued safeguarding of U.S. weapons and defense commodities. These criteria were based on the specific assurances and representations made to Congress by State and other agencies at that time, and were designed specifically to provide a basis in law for the purpose of the exemptions (i.e., "legally binding" agreements on "tight" third party retransfer control for "all" items (not just exempt) in order to "dramatically improve" our control of third party re-transfers, none of which appears to be achieved in State's negotiated texts). Of particular importance, however, was Congress' admonition to State and other parts of the administration *not* to pursue negotiations leading to a Canada-like exemption for other countries:

> "The Canadian exemption is a unique one. . . . These same considerations do not apply to either the United Kingdom or Australia (to say nothing of other countries). . . . (D)efense commodities being shipped between the United States and Canada are far less susceptible to diversion than items shipped longer distances on cargo vessels which must make multiple port calls before arriving in the final port of destination. Moreover, unlike the case in Canada, many major UK defense companies are now jointly partnered with other European firms." [28]

Increased Risks of Weapons Diversion

Exploitation of the Canada Exemption

Gray arms market dealers operating in the interests of rogue governments, criminal organizations and terrorist factions have not disappeared since 9/11, but have become increasingly effective at exploiting weaknesses in export controls by disguising illicit shipments as *bona fide* exports through such techniques as fraudulent documentation, forged end use certificates, establishment of front companies (particularly in the territory of major U.S. partners and along the busiest sea and air routes), and masquerading as legitimate firms using false addresses. The illegal network utilized by A.Q. Khan to conduct clandestine nuclear weapons proliferation typifies a larger problem in international commerce in which weapons technology of all kinds (conventional armaments as well as weapons of mass destruction) may be subjected to various levels of risk.

The 1999 review of the Canadian exemption suggests how pervasive such illegal networks may become in the absence of effective arms export controls. By April of that year, following a mounting number of cases involving violations of the Arms Export Control Act, the Department of State concluded that most state sponsors of international terrorism, illicit arms dealers operating in the interests of such "state sponsors," and other countries against which the United States maintains arms embargoes had established front companies in Canada for the sole purpose of illegally acquiring U.S. weapons technology. These countries included Iran, Libya, Sudan,

[28] See House Report 106–868.

and the People's Republic of China. The U.S. weapons technology involved was extensive, including:

> OH–58 Kiowa helicopters; M113 armored personnel carriers; klystron tubes for Hawk missile systems; infrared cameras; infrared detectors; jet engine vanes; fiber optic gyroscopes; gas grenades; projectile guns, military computers, spare parts for armored vehicles; spare parts for F/A–18 and other fighter jets, components for mobile radar systems; and gas turbine engines.

However, not all of the illegal activities were inspired from abroad by illicit front companies. A major U.S. defense firm also had initiated (through a Canadian subsidiary) manufacturing of a military system for Pakistan, a license for which the U.S. Government had denied in view of the sanctions in place on Pakistan at that time. However, the Canadian Government had no similar sanctions. The export from Canada of the system was legal under Canadian law and consistent with Canadian foreign policy at that time—illustrating that even our close allies do not always have the same foreign policy towards different regions and countries, and can sometimes provide a willing venue for military exports of U.S.-origin equipment that the United States does not consider to be in its best interests.

Recent Rise in Illicit Arms Dealers in Europe

What made Canada especially vulnerable to exploitation by illegal arms dealers was not merely its proximity to the United States, but the combination of: (1) the availability in its defense industry of U.S. manufactured components, parts and systems[29]; and (2) weaknesses in military export control coverage, characterized chiefly by the absence of a U.S. Government export license requirement for most weapons technology exported to Canada.

Furthermore, Canada is by no means the only U.S. ally susceptible to exploitation efforts by illegal arms dealers. Recent reports by the State Department to Congress required under section 655 of the Foreign Assistance Act of 1961 do not indicate abatement, but an upswing, in illegal arms acquisition efforts in the territories of U.S. allies, particularly in Europe. For example, State's report for fiscal year 2001 points out:

> "A notable trend revealed by Blue Lantern checks (i.e., State's end use monitoring program for military exports through commercial channels) over the past three years is the incidence of West European based intermediaries involved in suspicious transactions. In FY 2001, 23 percent of unfavorable checks, mostly for export of aircraft spare parts, involved possible transshipments through allied countries. In absolute terms, the number of unfavorable checks involving European based intermediaries increased." [30]

[29] Components, parts and systems manufactured in the U.S. are the first choice for illegal arms dealers, but also present greater difficulties due to the traditional U.S. government emphasis on prevention through case-by-case scrutiny. A close second choice, however, are such items when produced in the territories of U.S. friends and allies under U.S. granted rights (and built to U.S. supplied specifications).

[30] Recent reports required by section 655 are available from State at *www.pmdtc.org*.

Post-9/11 Criminal Investigations

Criminal investigations since 9/11 by U.S. law enforcement authorities involving illegal arms activities provide compelling evidence of the risks of diversions of US weapons technology, as well as vivid, contemporary reminders that our closest allies are as susceptible (and probably more so) to illegal arms activities that threaten our mutual foreign policy and security interests. These include:

- The investigation and arrest of a UK national (Mehant *Lakhani*) in August 2003 by the FBI's Joint Terrorism Task Force in Newark (and subsequent indictment in December 2003) on charges that he attempted to broker the sale of shoulder-fired missiles to terrorists who would then use them to shoot down commercial airliners.
- The announcement in 2003 by the Department of Homeland Security of searches conducted in more than ten U.S. states, involving 18 companies, concerning an extensive illegal arms acquisition network reportedly orchestrated from the UK by an Iranian front company (*Multicore*, Ltd.) based in London, which continued to conduct illegal purchases for Iran nearly 3 years after its U.S. subsidiary was shut down by U.S. law enforcement[31]; and
- Numerous other cases highlighted by the Department of Homeland Security's September 2003 report of recent strategic investigations involving conspiracies to divert U.S. weapons technology, including fighter jet components to Iran; components for Hawk missiles, fighter jets and helicopters to the People's Republic of China; aircraft engine components to Libya; howitzer parts, radars, and armored personnel to UAE and Pakistan; unmanned aerial components to Pakistan; MAK–90 assault weapons to Colombian guerillas; radar components to Iran; Hawk missile, TOW missile, AIM–9 Sidewinder missiles, F–4 fighter jet components and F–14 fighter jet components to China; and military encryption devices to China.[32]

Weapons and other defense commodities are easier to divert when unlicensed for a variety of reason touched on in this report, but fundamentally because, as summed up earlier this year by the State Department in the sectional analysis it prepared to accompanying its proposed amendment to the Security Assistance Act of 2000, such arms exports are "harder to keep track of."[33]

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[31] In December 2000 U.S. law enforcement filed a criminal complaint against Multicore, Ltd. (the U.S. subsidiary of Multicore, Ltd. UK) in San Diego that led to the conviction of its owner and another individual for illegally transshipping several million dollars worth of components and parts to Iran for F–14, F–4 and F–5 fighter aircraft, as well as for Hawk missile systems.

[32] See the Department of Homeland Security, Bureau of Immigration and Customs Enforcement's September 2003 report on recent strategic investigations (appended to this report).

[33] Sectional Analysis accompanying Final Administration Approved State Department Authorization Act, Fiscal Years 2004 and 2005. (April 1, 2003).

Nature of the Weapons Technology at Risk

The Department of State has consistently represented that only certain weapons commodities would be permitted for export "license-free" under the exemption, those that are "unclassified" and of "low sensitivity." The exclusion of classified weapons from the exemption, while appropriate, does not actually serve to limit the application of the exemption to any measurable degree. This is because the number of licenses for classified commodities exported through commercial channels is very small—historically ranging from two to three hundred licenses worldwide on an annual basis (out of approximately 45,000 licenses for all munitions transactions) or .007 percent.

The second criterion used by State—"low sensitivity"—is purely subjective, lacking any definition in the U.S. arms export control system. However, by any reasonable standard, the weapons commodities that would be susceptible to increased risk of diversion are not, as has been described by State, merely those of "low sensitivity"[34], but comprise an impressive array of lethal munitions, other items having substantial combat utility, and still other items which, at high performance levels, are specified on the Militarily Critical Technologies List ("MTCL") because of their importance to maintaining war fighting superiority for U.S. forces.

Many "low sensitivity" items that would be subject to license-free shipments under the State Department's proposal could be expected to figure prominently (and in some instances are known to have) in the acquisition plans of state sponsors of international terrorism and other countries and groups engaged in illicit arms trafficking, including:

> Shoulder fired missiles, patrol vessels, body armor, operational flight trainers, rockets, torpedoes, bombs, mines, military explosives and propellants, amphibious warfare vessels, harbor entrance detection equipment, large caliber ammunition, self-propelled guns, mortars, etc.

The shoulder-fired missiles in the *Lakhani* case and most of the defense commodities in the *Multicore* case would be eligible for license-free export to the UK and Australia under State's proposal.

Other defense commodities that would be included under the rubric of "low sensitivity" would be about 80 percent of the weapons and other defense commodities that figure in the September 2003 Homeland Security report of recent strategic investigations.[35]

Still other defense commodities that would be eligible for license-free export under the proposed arrangements are numerous commodities which, at high performance levels, are weapons systems technologies specified on the Militarily Critical Technologies List ("MCTL")[36] because of their importance to maintaining U.S. war

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[34] For example, see the letter dated May 20, 2003, from Deputy Secretary Armitage to Chairman Hyde.

[35] See Appendix to this report.

[36] The Militarily Critical Technologies List is required to be maintained and kept up to date by the Department of Defense by the Export Administration Act of 1979, as continued in force by Executive Order. The MCTL is used for evaluating potential technology transfers. It assigns

Continued

fighting superiority (e.g., from just two categories of the many USML categories that would be license-free, such MCTL items would appear to include: shaped charges, tandem or multiple warhead munitions, explosively formed projectiles (EFP), gun propellants, certain energetic materials, electronic time fuses, smart mine fuses, guidance integrated fuses, encapsulated multistage munitions, advanced modular artillery charges, surface vessel systems, such as passive mounts for acoustic isolation, active noise reduction or cancellation systems, passive acoustic sensors for locating direct fire weapons on land, phased array radars, and ground radar).

In Chairman Hyde's letter of June 25, 2003, to Secretary Powell, he requested that the State Department consider the removal of items that could not reasonably be characterized as being of "low sensitivity" because of their designation on the U.S. Munitions List as "significant military equipment," a category of weapons commodities that is required by section 47 of the Arms Export Control Act to be so designated because of their substantial combat utility. However, State declined to make this change in its response of July 25, 2003.

Most USG Controls Eliminated

Regardless of the relative effectiveness of either foreign government's arms export control system (discussed later in this report), the proposed arrangements will almost certainly enlarge the risks of diversion by eliminating on the U.S. side nearly all critical elements of prior U.S. Government scrutiny and control that would otherwise precede the export of weapons and defense commodities from the United States—a vulnerability that is not addressed in any substantial way by the proposal.

When juxtaposed against a foreign government's system, the risks of diversion of U.S. weapons technology may be increased or reduced as a result of stringencies (or lack thereof) in the other government's control system. But, even highly effective foreign government controls are mainly applicable only after weapons and defense commodities enter its jurisdiction. In the post 9/11 security environment there are heightened risks associated with all phases of commercial defense trade, including the period during their transport to a port of exit; during their loading and export at U.S. ports of exit; while they are in international transit by air or sea; upon their arrival at a foreign country's port of entry; and following entry into the foreign country's jurisdiction.

Moreover, these risks vary not only according to the geographic distances over which controlled trade must travel, but also increase by any reduction in the U.S. Government's scrutiny and control. These safeguards and control over all exports, which are required by, or derived from, specific provisions of section 38 of the Arms Export Control Act, provide a system (by no means foolproof) that is intended to control these risks at various junctures in the export process. Yet, nearly all levels of U.S. Government scrutiny and con-

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values and parameters to weapons systems technologies in order to determine those that are critical to U.S. military forces.

trol would disappear under the proposed exemption arrangements, including:

- U.S. Government evaluation of all contracts and purchase orders to ensure authenticity;
- U.S. Government evaluation of the details of the defense goods proposed for export in the context of their proposed end use, and the requirements and capabilities of the non-governmental end users as well as their recent licensing history;
- Regular, updated computer checks of all U.S. exporters;
- Screening of *all parties* involved in the export transaction, not merely the foreign end user, but also the many freight forwarders and consignees typically involved in both countries for any single arms transfer;
- Pre-license end use checks where indicated to ensure the authenticity and bona fides of proposed transactions; the availability to U.S. Customs from State's licensing database of detailed, near real-time licensing information for all arms exports in order to guide movement of these goods through controlled procedures at U.S. ports of exit; and
- Lodging of licenses with Customs at U.S. ports of exit, which, together with database transfers provided by State, are critical elements of a baseline for targeting and inspection purposes before cargo is loaded.

Few Transshipment Controls in the UK

The risks of diversion associated with the activities of the gray arms market and the elimination of most U.S. Government controls appear to be further accentuated by two additional factors. The first concerns the UK, specifically, and the apparent absence in UK practice of license requirements for most conventional weapons technology when transshipped—or in transit—through the UK to a third country.[37] The importance of transshipment controls in protecting against diversion has recently been emphasized by President Bush with respect to weapons of mass destruction in the Proliferation Security Initiative and in recent international conferences spearheaded by the Department of Commerce.[38] But, this emphasis appears to be conspicuously absent from the country exemption agreements negotiated by State.

New Burdens on Homeland Security

The second factor concerns the day-to-day functioning of the U.S. arms export control system in the post-9/11 environment. Since the attacks of September 11, 2001, U.S. customs and border protection officials have been required to shift resources and priority away from outbound inspection and targeting of shipments leaving the United States to closely monitoring inbound cargo that could present immediate risks to U.S. internal security. The absence of

[37] In contrast, the U.S. Government requires a munitions license for all military goods transiting or temporarily imported into the United States through commercial channels. It is not known whether Australia will require such licenses in its future system.

[38] For a discussion of the latter, see "Department of Commerce Transshipment Export Control Initiative (TECI)" at the Bureau of Industry and Security's website: *www.bxa.doc.gov*.

detailed license information from State on exempt munitions exports and the absence of licenses to be lodged at U.S. ports of exit—both being inevitable by-products of the proposed arrangements—can only further complicate screening and targeting of commercial arms exports. Early consideration in the country exemption proposal of additional documentation U.S. exporters would be required to file at U.S. ports appears to be no longer the subject of any discussion. In effect, while the Department of Homeland Security is concentrating on closing the "front door" to dangerous imports, the arrangements proposed by State appear to have the consequence of opening the "back door" to dangerous exports.

The Committee understands unofficially that, in response to U.S. law enforcement concerns, the Executive Branch may now be exploring use of the Commerce's Department's automated export system (AES) to alleviate part of the additional burden on Homeland Security should exemptions be authorized in law. While this would be a welcome first step in helping to reduce some level of burden shifting (and risk), it remains to be seen what, if anything, will come of this consideration. It is also disappointing that this avenue is only being explored so late in the process when the Congress has repeatedly authorized funding related to AES—and earmarked a portion of that funding for the State Department—for the specific purpose of ensuring strict control over all U.S. weapons-related exports.

However, the Committee notes with concern the Department of Homeland Security's view that the proposed ITAR exemptions "could . . . require additional inspectors" and that "programming changes used to verify those exports against the proposed ITAR country exemptions, and to target potential shipments in violation of the exemptions" will require additional funding."[39] The fact that additional funding will be required and that additional personnel could be required contradicts the answer provided by the Department of State in its July 25, 2003, letter in response to the Committee's question concerning projected costs to the U.S. Government, when State advised that "the costs to the USG for regulating these exemptions should arguably decrease as AES goes on line this Fall. . . ."[40] It would appear that, even at this late date, there has not been any serious consideration of the true costs to the U.S. Government or the implications of additional burdens being imposed on DHS that may go unfunded. Nor has any budget information been provided to Congress concerning the costs associated with implementation.

Impediments to U.S. Law Enforcement

There are corollary impediments to the U.S. Government's ability to enforce violations arising from the elimination of most U.S. controls, as well as to its ability to prevent and detect of violations. These considerations also need to be weighed against the reality that, historically, there have been few (if any) successful prosecutions in U.S. federal courts of Arms Export Control Act violations

[39] Letter dated November 17, 2003, from Under Secretary Hutchinson to Chairman Hyde.
[40] See July 25, 2003, letter from Assistant Secretary Kelly.

that involve circumstances where no export license is required. This is due to several considerations, including the inclination of most U.S. courts to view the license requirement as highly relevant to the establishment of a person's legal duty under U.S. law, and of most federal prosecutors to regard the absence of a license requirement as signifying an activity of lesser importance to the U.S. Government (for which view they could hardly be faulted in light of State's repeated public description of this proposed exemption as involving only items of "low sensitivity").

These impediments to prosecution, detection and prevention arise, in the first instance, from the elimination of most documentary requirements—sworn applications, signed end user certificates and the like—related to the license application process, and the elimination of the requirement for an exporter to lodge the approved license (there will not be one) with U.S. Customs at the port of embarkation prior to export, as noted above. These impediments remain even if there is the kind of full investigative cooperation on the part of the UK and Australia that is needed to facilitate U.S. law enforcement in an unlicensed environment. But, they may become insurmountable if cooperation from foreign governments is not forthcoming in all instances—and at all levels of the enforcement process, from instances where information or documentation is sought in the early stages of an investigation, to instances where the availability and admissibility of evidence must be ensured in a criminal proceeding. Yet, despite this added premium on foreign law enforcement cooperation, full cooperation is actually not required under the arrangement with the UK. This is apparently because when State decided in the late stages of negotiating the arrangement with the UK to move many important areas to a civil contractual arrangement between the UK and its firms, it appears to have overlooked that the draft memorandum of understanding negotiated 2 years earlier by Department of Justice officials was based (as is customary in such matters) on the principle of dual criminality. Under this principle, the parties agree to cooperate (i.e., commit to cooperation) in areas in which a violation would be an offense under the laws of both countries. However, violations of the civil contract between the UK government and its firms will be legally enforceable in an English court only under English common law, and would not normally involve criminal offenses on the UK side. The net result is that such violations would not require cooperation from UK authorities (though the UK could agree, at its discretion, to provide cooperation on an ad hoc basis).

Even assuming full UK cooperation with U.S. law enforcement authorities in sharing of information and documentation available to it through the civil contracts with its firms, a more fundamental problem is that sharing of information in this fashion is mainly relevant to discovering and prosecuting violations *after* they have occurred, rather than preventing them prior to original export. Independent of the wisdom of such a shift in policy (which has not been established), U.S. law enforcement agencies have long felt that any departure from case-by-case licensing, including in the case of Canada, poses challenges for law enforcement interests and recommended to State in the negotiations with the UK and Australia that both governments amend their laws to ensure a consistent

level of enforcement between exempt and non-exempt items. This has not happened in the UK and it remains to be seen if it will happen in Australia.

The Committee presented several other questions to the State Department related to law enforcement interests that were only answered during the waning days of the first session of the 108th Congress. These answers are appended to this report. One critical question that remains unanswered to this day relates to the requirement in existing law for a determination by the Attorney General with respect to the ability of the United States to detect, prevent and prosecute criminal violations of the Arms Export Control Act, including efforts linked to international terrorism.[41]

U.S. Government Consent Rights Adversely Affected

Even under a best-case analysis, the arrangements negotiated by State fall far short of the laudable goals established by Secretary Cohen in the previous administration of using country exemptions as a "powerful incentive" to negotiate "ironclad" agreements with U.S. allies in key areas, such as re-transfer and end use, in order to provide a "dramatic increase in our global technological security."[42] In fact, the arrangements appear to reflect a marked deterioration in the status quo for protecting U.S. Government consent rights.

The reason why this area was properly emphasized by Secretary Cohen is because the requirement for prior U.S. Government consent before any transfers to third countries take place or before U.S. defense articles may be used for purposes other than those originally authorized, has long been considered a cornerstone of the U.S. arms export control system. It is indispensable to ensuring: (1) that both secondary uses of U.S. weapons technology involving third countries (e.g., through resale by the original recipient country or commercial vendor to another country) and access by nationals of countries other than those to which the weapons were approved (commonly referred to as "third country" nationals) accord strictly with the same U.S. laws and policies which governed the original export; and (2) that U.S. military systems and components do not fall into dangerous hands. The current, dominant role of the United States and its defense firms in the global arms market and the heightened threat to U.S. interests world wide in the global war on terror suggest this may not be the most appropriate time to attenuate this requirement.

However, a much different outcome has emerged from the negotiations with both countries than described to Congress at the time of enactment of the Security Assistance Act of 2000. Neither the arrangement negotiated with the UK nor the arrangement negotiated with Australia contains a legally binding commitment by either government concerning non-transfer and end use and the requirement for the U.S. Government's prior written consent over these

[41] See the annex to Chairman Hyde's May 5, 2003, letter to Secretary Powell.

[42] Letter dated June 28, 2000, from Secretary Cohen to Chairman Gilman, Committee on International Relations, U.S. House of Representatives.

matters as they pertain to U.S. defense articles and services where the governments, themselves, are the end users.[43] State suggests that the arrangements it negotiated could be interpreted in such a way as to imply the necessary commitments. But, the words are simply not there. Nor has State proffered that it will insist on these commitments in an exchange of diplomatic notes (as was done with Canada). Notwithstanding these glaring omissions, the United States would be bound under these arrangements—in language that is very clear—not to seek third party re-export or re-transfer assurances in the future from either the UK or Australia.

In the case of Australia, the Committee had assumed that this omission was an unintentional oversight. But, the State Department has not acknowledged the omission, let alone moved to correct it, raising concern that there may be more involved, such as a substantive objection on Australia's part.

Regarding the UK, instead of providing an increase in U.S. global technological security, the absence of any UK government commitment to seek U.S. Government consent prior to any third country transfer—and the consignment in the UK arrangement of U.S. Government rights over re-transfer and end use of U.S. weapons exports involving UK firms to a civil contract between the UK and those firms (enforceable mainly under English common law)—could be highly prejudicial to U.S. interests, if viewed (as appears certain it would be) as a precedent by other governments for their own defense trade with the United States, a number of which are already hoping the ongoing export control "reform" debate in Washington surrounding NSPD–19 will result in an attenuation of U.S. Government policy in this area.

Further, the State Department did not negotiate a legally binding commitment from the UK government in this area, as required by U.S. law. Rather, it negotiated what it describes as a "politically" binding commitment[44] from the UK by which the UK government would enter into civil contracts with UK companies qualified to receive license-free U.S. defense articles, which contracts would require, as a condition of their qualification (or eligibility), the UK companies generally to acknowledge and adhere to U.S. non-transfer and end use requirements. However, the UK government, itself, would make no such commitment—even of a political character—under any provision of the draft arrangement. The purpose of requiring a legally binding commitment in the Security Assistance Act of 2000 on this critical matter was not merely to ensure that the commitments were binding under international law, but to ensure that that there was an appropriate domestic legal basis in the "exempt" country to ensure the commitments made were fully enforceable under that country's criminal laws (and not

[43] The arrangement with Australia contains assurances with respect to issuances of licenses to Australian persons that involve U.S. origin defense articles, and State advised in its July 25 letter that the Government of Australia's own exports are also subject to its licensing process. However, recent discussions between Committee staff and Australian officials have clarified that, in fact, Australia does not issue licenses to itself and that there may be a legal rationale to the omission of third party consent in the bilateral agreement.

[44] Binding commitments between governments are typically reflected in treaties or other international agreements, while "political" commitments, no matter how solemnly made or at what level, do not actually "bind" governments. The term "politically binding" is not in normal diplomatic usage.

through a court of common pleas in which the United States may not even be a party at interest).

The UK commitment is one to give "fullest weight" to U.S. views on retransfers and, in exceptional circumstances, to consult with the United States. The UK government would assure enforcement of such commitments by its qualified companies through its review of individual and general (or open, self-validating) export licenses (though, in fact, governmental reviews of individual exports under general licenses are not typical).[45] On the other hand, the agreement with Australia expressly precludes the use of general licenses for this purpose, and properly so.

The Committee sought an explanation from State as to the reasons provided by the UK for not accepting the U.S. Government's rights in this area and was informed by State:

> "The UK government would not provide us with a legally binding commitment with regard to U.S. requirements to obtain prior written consent for transfer of U.S. defense articles to third party destinations and changes in end use because it argued to do so would infringe on UK sovereignty including by unacceptably fettering the discretion of the UK Secretary of State for Trade and Industry to make licensing determinations."[46]

However, the relegation of a fundamental U.S. interest to such a feeble status in the UK arrangement, and the State Department's explanations for this development, seem inexplicable in view of the UK's unqualified acceptance of the right of governments to prior consent over the transfer of "commercially" sensitive information in a treaty governing defense industry cooperation that was signed by the British Minister for Defence (and since ratified by the UK) with five other European nations in the midst of the bilateral U.S.–UK negotiations concerning this matter.[47]

Article 52 of that treaty provides:

> "The Party receiving information which is of commercial value or market sensitive from another Party shall not use or disclose such information for any purpose other than the purpose for which it was provided, unless it has received the prior written consent of the providing Party."

It is difficult to understand how such a right could be accorded by the UK to its EU partners for "commercial" and "market sensitive" information, but denied on grounds of UK sovereignty for U.S. Government information that is controlled for export on national security grounds. It is equally difficult to understand why

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[45] However, as most exports under general licenses are self-validating by the exporter and do not involve submission of a license application, there will be few such reviews by the UK government of general licenses.

[46] July 25, 2003, letter from Assistant Secretary Kelly to Chairman Hyde, p. 14. Similarly, in a related area, State also explained n this same letter that "(i)n part, the point of the agreement is not to give U.S. law extraterritorial effect. . . ."

[47] See Article 52 of the Framework Agreement Between the French Republic, the Federal Republic of Germany, the Italian Republic, the Kingdom of Spain, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland Concerning Measures to Facilitate the Restructuring and Operation of the European Defence Industry, done at Farnborough, UK, July 27, 2000; entered into force April 18, 2001. The Framework Agreement is a treaty within the meaning of the Vienna Convention on the Law of Treaties.

the State Department did not pursue this matter with greater vigilance.

Further, while Article 52 specifies the commitments of the Parties with respect to information or data, Article 13 (at paragraph 4) provides a comprehensive procedure for the Parties when authorizing re-exports by private persons, in which, for example, a Party who may not be a participant in a cooperative armament program commits itself to obtain approval from the participating Parties before authorizing any re-export to non-Parties of articles produced under the program. Similarly, Article 13 (at paragraph 5) requires that Parties obtain end user assurances and consult with relevant other Parties if a re-export request is received. In contrast, the commitment negotiated by State in the UK arrangement is for the UK to consult with the U.S. before issuing an export license for U.S. defense articles only in "extraordinary circumstances."

Taken together, these two principles which found ready agreement in the EU Framework Treaty—prior consent and prior consultation before private exports are authorized—have been cornerstones of the U.S. arms export control system for many years.

With respect to the issue of extraterritoriality more generally, far from being politically or legally opposed to the principle of prior consent requirements of governments, EU members have recognized the validity of such requirements, not only in the case of the Framework Agreement, but also as a principle that may be generally applicable to their arms sales. For example, the Fourth Annual Report on the European Code of Conduct on Conventional Arms states that:

> ". . . in accordance with their national legislation, member states can require, inter alia, a clause prohibiting re-export of the goods covered in the end-use certificate. Such a clause could, among other things, . . . provide that re-export will be subject to agreement in writing of the authorities of the original exporting country (and) an undertaking, where appropriate, that the goods being exported will not be used for purposes other than the declared use." [48]

However woefully short of the statutory standard and prejudicial to broader U.S. interests in third party transfer and use issues, it is also remarkable that the overall arrangement in this area with the UK appears to involve additional specific concessions by the U.S. Government. Under the negotiated arrangement, the U.S. Government would, in exchange for the UK's "political" commitment, waive (e.g., forsake) its consent requirements in two areas: (1) for all intra-UK transfers of exempt articles involving qualified companies;[49] and (2) for any use of U.S. defense articles (whether

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[48] DGE VII 13779/02, Brussels, November 11, 2002.

[49] The re-transferring UK firm would still be required to obtain the assent of the original U.S. exporter in order to avoid infringement of the latter's commercial rights or interests. There is no firm estimate from State as to how many companies in the UK or Australia could be qualified. State advises it sees no need to place a limit on the number. In the case of Canada, the original estimate of firms that might be eligible under that exemption was around 250, but there are currently more than 600 companies eligible with business premises at 2,000 locations. In Australia's case, State points out that participation in the exemption is limited to participants in Australia's Defence Industrial Security Program, which currently has 364 members, though State also points out there could eventually be as many as 600 companies, though it does not

Continued

or not exempt) involving UK defense purposes, applicable both to the UK government and third country forces cooperating with it.

Yet, the Security Assistance Act of 2000 did not authorize State to waive or forsake these fundamental U.S. Government requirements; quite the opposite, it provided for such rights to be asserted and protected.

Absence of Comparability

Except in the area of weapons of mass destruction, and discrete other areas where it is closing gaps in implementation of the Export Control Act of 2002, the future UK arms export control system will not be comparable in scope to the comprehensive system deployed by the United States, but will generally remain a "targeted" system, essentially reserving case-by-case licensing to WMD and certain other areas, while relying on a variety of "open" (or general) licenses for the bulk of conventional weapons related exports (an approach that is roughly analogous to the U.S. Department of Commerce's approach to dual-use trade). The UK did not view the proposed U.S. exemption as an incentive for changes to its laws or regulations. Similarly, the Department of State advises there are certain areas where Australia has decided not to make "comparable" changes, but others where it may view the proposed U.S. exemption as an incentive (though it is not possible to know the precise scope and content of Australia's future system as it is still being debated internally).

The effectiveness of a government's arms export control system largely revolves around two main components: The defense control list and the regulations that govern control over, and access to, items and technologies on the defense control list. With respect to the latter, the table at appendix 1 provides a comparison of the U.S., UK, and Australian systems in key regulatory areas. That comparison does not indicate comparability in scope and effectiveness, but significant incomparability.

Regarding the defense control lists, on June 25, 2003, the Committee requested that the Department provide the expert analysis underpinning its conclusions as to comparability of both the UK and Australian military lists with the U.S. Munitions List for purposes of compliance with the statutory criteria. The Committee was advised by the Department in its July 25, 2003, letter that "(t)he expert level analysis . . . is still being worked by the Defense Technology Security Administration." The Department eventually provided this analysis by letter dated November 6, 2003, which is appended hereto at Appendix 12. This analysis and various provisions of the proposed arrangements indicate that the Department intends to exempt a variety of U.S. Munitions List items, including space systems and space launch vehicles ("SLVs"), from U.S. munitions export licenses even though these items are not included within the coverage of the UK or the Australian "list of controlled *defense* items", as required by section 38(j), but are in both coun-

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explain the discrepancy. There are no estimates available for the UK, but in view of the size of the British defense industry in comparison to Canada's the number of exempt firms and business locations could be expected to be much greater.

tries treated not as munitions or *defense* items, but as *dual-use* items.

Indeed, the Department appears to have liberally interpreted various provisions of United States law in negotiating these agreements, and to have misconstrued others. The inappropriate inclusion of U.S. defense articles that are handled only as dual-use abroad is but one example. There are others. In the Conference Report accompanying passage of the Security Assistance Act of 2000, the Conferees made clear that—

> "*essential* to the initiative to provide license-free trade to various countries is the operation of *domestic export control laws* in such countries. Accordingly, the underlying rationale governing section 102 is that the United States should not provide the benefit of an exemption from licensing of U.S. defense exports unless a foreign country agrees to apply, in a legally binding fashion and in accordance with a bilateral agreement with the United States, *the full range of United States export control and laws, regulations, and policies* appropriate to the sensitivity of defense items exported to a foreign country under the exemption."[50] (emphasis added)

Yet, in the proposed arrangements presented by the Department for both the UK and Australia there is little evidence of any attempt to apply (or to achieve) the application of the "the full range" of U.S. controls. Further, the Department appears not to have assigned much importance to the phrase "at a minimum" which appears throughout section 38(j) or to the clear guidance of the Conference Committee—apparently opting, instead, to construe certain provisions in ways that might appear unimaginable to the Conference Committee (e.g., in lieu of changes to UK export control laws, there will be civil contracts between the UK government and its firms covering U.S. exempt weapons technology that would be "legally binding" only under English common law and enforceable by the UK government mainly through the imposition of contractually provided penalties and successful motions filed in UK civil courts for injunctive relief[51]).

The UK appears to have made clear that it was not prepared to make changes in its laws or regulations in order to accommodate the requirements of U.S. law. Faced with this position, the Department appears to have set about to construct as elaborate a case as it could for proceeding with the agreement and establishment of an exemption by inserting various palliatives into the proposal to show the negotiations were successful. By itself, such an approach, while not optimal, is at least understandable on one level insofar as it may concern our relations with close allies.

What is less understandable is the Department's unwillingness to make any commitment with respect to the extension of such exemptions to other countries, in view of the (at best) mixed results of the negotiations with the UK and Australia, particularly if this unwillingness is motivated by a desire to avoid the potential em-

[50] House Report 106–868, pp. 2–3.

[51] A much different—and untested—form of enforcement from the routine exercise of police powers by UK law enforcement agencies, which would not be available for offenses arising solely from a civil contract (e.g., an export in progress of U.S. weapons technology that had not been authorized by the U.S. Government).

barrassment of retreating from this much-touted DTSI initiative or the defense export control "reform" agenda more generally.

This is a matter of considerable importance to Congress in deciding whether, and if so, how, to authorize exemptions for the UK and Australia because of the possible precedence established by these agreements. For example, there are few elements of the UK system—and none achieved in these negotiations—that would distinguish it sufficiently from the national systems of other EU governments, such that there would be a basis for determining the UK system is "comparable" but others are not. Similarly, while the draft agreement with Australia is a more conventional intergovernmental arrangement and more reflective of the commitments Congress expected to see in these agreements, it is also the case that: (1) there are significant issues related to U.S. Government consent rights and the scope of the exemption insofar as it concerns articles treated as dual-use items in Australia, which State's presentation merely glosses over; and (2) the text of the arrangement is short on details on the domestic legal framework that will underpin Australia's commitments—and State has been able to fill-in these details only partially and at a very high level of generality. Unrevealed in the agreements and in the Department's representations is whether Australia intends to meet all of its commitments through the enactment of new laws and regulations (as clearly intended in section 38(j)) or through more unorthodox means (such as those evident in the UK arrangement).

Concerns that the pursuit of more country exemptions will continue and is motivated primarily by the objective of relaxing arms export controls, are reinforced by the Department's position that the control systems of both countries are—or will be—"comparable' to the United States notwithstanding the broad noncompliance of the negotiated agreements with the requirements of U.S. law. The Committee is concerned that, if these agreements negotiated by State with our closest allies are inadequate—as it appears they clearly are—additional exemptions for other countries could be dangerous in the extreme.

Most U.S. Statutory Requirements Unmet

The Department's proposal acknowledges that: (1) the Australian agreement does *not* meet the criterion of section 38(j) regarding retransfers and use (because of the absence of control in the Australian government's system on in-country transfers or use and its unwillingness to establish such controls); and, (2) the UK agreement does *not* meet several of the mandatory criteria of section 38(j). It, therefore, supported legislation in the Senate (S. 2144) that would authorize the President to waive these requirements (while maintaining the administration position in the House that would permit it to waive any and all requirements for any country). However, it is not easy to support the Department's reading of the law in order to reach the conclusion that *any* of the mandatory criteria are met in the case of the UK (which raises questions about how it would interpret the Senate bill).

There are two other mandatory criteria, which State appears to believe have been met, but which are open to serious questioning

(and which may help explain why State proposes that the House enact legislation that permits the Executive Branch to waive any provision in section 38(j) for any country (not just the UK or Australia)).

The first is the requirement in section 38(j)(2)(A)(iii) concerning "establishment of a procedure comparable to a 'watchlist' (if such a watchlist does not already exist) and full cooperation with United States Government law enforcement agencies to allow for sharing of export and import documentation and background information on foreign businesses and individuals." The U.S. "watchlist" is a computerized list of more than 50,000 ineligible (for various legal reasons) and suspect or known-diverters, both U.S. or foreign persons (including companies), against which all parties to an export license application are screened. The Department's June 4, 2003, analysis appears to conflate the "watchlist" requirement with the requirement for sharing of law enforcement information: "The watchlist procedure criterion is addressed under the practice of utilizing intelligence and law enforcement information in the licensing review process and for monitoring trafficking. Such a procedure with the UK would appear, we understand from the regulators, to flow, as a practical matter, from the law enforcement and other commitments provided for in the agreement and the MOU." However, the fact of *some* use of intelligence and law enforcement information when reviewing license applications is not comparable to a systematic process for collecting and maintaining in a computer database the names of all known ineligible and suspect persons, and does not explain the absence of any commitment in the agreement on the UK side to maintain or establish a "watchlist" of any kind.

Further, with respect to sharing of law enforcement information, since the law enforcement MOU negotiated by the Department of Justice with the UK only requires cooperation in cases where dual criminality is present (and provides that there "may" be additional cooperation in other areas)—and because the general scheme negotiated by State essentially means that enforcement of civil contracts between the UK and "qualified" companies will not generally involve criminality on the UK side—there is also room to question the extent to which (if at all) this arrangement meets a mandatory requirement for information sharing.

The second is the requirement in section 38(j)(2)(A)(iv) concerning "establishment of a list of controlled *defense* items to ensure coverage of those items to be exported under the exemption" (emphasis added), and the problems associated with State's attempt to interpret this provision as encompassing *dual-use* controls of a foreign government, which were discussed in a preceding section of this report.

Comparison to Canadian Exemption

In response to the illegal exploitation efforts identified in April 1999, the Canadian Government took a number of steps to strengthen its national system of export controls, including enactment of new laws and regulations to harmonize its list of controlled military goods with the U.S. Munitions List; to establish a system

for registering Canadian defense firms; to require U.S. Government re-export authorization in connection with permits to export U.S-origin military goods from Canada; and, to pledge in an exchange of diplomatic notes that the Canadian Government would not authorize the re-export, resale or other disposition of U.S. Munitions List items outside Canada without first consulting the United States Government to ensure that its re-transfer approval has been obtained. In response to these steps, the United States restored the exemption for Canada on the eve of the announcement of the DTSI initiatives.

While the proposed arrangements with the UK and Australia appear to be modeled after the Canada exemption in some respects, the UK agreement is clearly less satisfactory with respect to third party transfer and use matters and the Australia agreement may be somewhat less satisfactory (in failing to provide such an assurance with respect to the Australian government, itself, as distinct from Australian companies, though State advises this is implied). Both agreements may also be less satisfactory with respect to coverage of military items when incorporated in civil products (which neither agreement appears to control) and also with respect to the actual coverage of the lists. In response to various expert level meetings, the Canadian Government made a number of additions to its control list in order to harmonize it with the U.S. Munitions List. There is no indication of such additions for the UK or Australia.

State has suggested that the agreement with the UK, in particular, represents a significant improvement over the Canada exemption because the U.S. Government has the right of final approval over which UK end users are "qualified" to receive license free US defense commodities, while all companies duly registered in Canada in accordance with new legislation Canada enacted in 1999 are so eligible. However, as noted earlier, the U.S. Government routinely exercises the right to approve foreign end users in the export license process, so such a right does not imply any improvement over traditional licensing procedures (for reasons noted earlier, it actually represents a substantial derogation since licensing procedures approve all parties to the transaction, not merely the end user). With respect to whether it provides an improvement over the Canadian exemption, the State analysis appears to be making a distinction without a difference. By now, State (presumably) would have vetted all Canadian registered companies through the same vetting procedure it intends to apply to proposed UK companies and would have taken appropriate action through diplomatic channels with Canada to disqualify unreliable or suspect end users, if any, following approximately the same consultative process it has sketched out with the UK and Australia.

Of more significance, however, is the impression that, instead of representing a raising of the bar beyond those standards negotiated with Canada by the previous administration in 1999, the proposed arrangements with the UK and Australia are, in the final analysis, less stringent—in some areas, woefully so.

Excessive Delays For UK and Australia Licenses

One troubling piece of information obtained by the Committee in this review was State's acknowledgement that, under current guidelines, there were eight hundred and forty three (843) munitions export license applications for either the United Kingdom or Australia referred for inter-agency review to the Department of Defense before being approved that would be eligible for export without a license under the exemptions, if established. About 50 percent of these applications for the UK and some 64 percent for Australia were approved with limitations or conditions. When a license application is processed by State without referral to Defense or other agencies, it is typically completed within 8 calendar days. Historically, about 70 percent of all munitions license applications are so processed by State. On the other hand, when a license application is referred to Defense or other agencies for review (about 30 percent of all cases), the processing time increases to 4 to 6 weeks.

These figures indicate one of two possibilities: (1) an exceedingly high number of cases for our closest allies are being unnecessarily subjected to lengthy inter-agency review, doubtless contributing to frustration by the interested parties (the relevant governmental agencies and defense firms) in both countries; or (2) Defense's national security review and conditioning of approvals of these cases is necessary and appropriate in order to ensure these exports are consistent with U.S. technology transfer policies administered by DoD. It is unlikely that the second possibility accurately describes the situation because this would imply that various U.S. policies covering technology security and disclosure of military technology to our allies provide for greater access by Canada or Canadian firms (who are currently receiving all of the weapons and other defense commodities in the 843 cases license-free under the Canada exemption without any DoD review or conditions) than for the UK or Australia. To the Committee's knowledge, there are no such U.S. technology security or disclosure policies that discriminate in favor of Canada and against the UK or Australia. State essentially glosses over this matter by observing:

> "It should be noted that those cases that were referred to DOD and adopted with provisos were in a context where we did not have the special protections provided under the measures. In the context of those measures, the Departments of State and Defense are fully comfortable with approving the exports of items subject to an exemption to the UK and Australia governments and qualified firms without interagency referral or provisos."

By reference to these "special protections," State presumably means those provisions in the arrangements (or the civil contract in the case of the UK) that concern qualification of the UK and Australian companies and re-transfer and end use. However, these provisions or "special protections" (which, as indicated in this report actually provide less protection and greater risk than traditional licensing) do not in any case relate to any of the factors appropriately related to referral of cases to DoD for a national security review or—if they did—would strongly imply that U.S. policy

governing the conditions for disclosure to Canada, the UK and Australia are seriously conflicted. Based on the explanation provided by State to date, it is difficult to avoid the conclusion that—either intentionally or not—a large number of licenses for the UK and Australia are being unnecessarily delayed and encumbered by excessive inter-agency review. It is a compelling argument not for an exemption, but for enactment of the "fast-track" licensing procedures for the UK and Australia contained in H.R. 1950, which the House passed earlier this year.

Enactment of the fast-track licensing provisions of H.R. 1950 for the UK and Australia would remedy this situation by prompting a review of referral procedures for both countries and by requiring a determination by the Secretary of Defense before any item that is exempt for Canada would be subjected to lengthy inter-agency review for the UK and Australia. This would also surely accomplish more efficiently, and without any of the attendant risks to U.S. national security and law enforcement interests arising from State's exemption proposal, the objective State and Defense have described of freeing up resources currently devoted to low risk cases (by which they must mean those resources devoted to technology transfer policy, largely resident in Defense, in view of the above data).

Conclusion

The United States may be squandering a unique opportunity to establish very significant bilateral arrangements with our closest allies, which not only set a high standard for other countries to follow (a goal which seems axiomatic in the war on terror), but which also provide an appropriate framework that reflects the nature of current and future cooperative research in areas of high priority to the U.S. Government and our closest allies, such as missile defenses and advanced fighter aircraft.

Such cooperative research areas are primarily carried out through defense services, a form of cooperation that is virtually excluded from the proposed arrangements in favor of the Department's decision to apply a "Canada-like" list of commodity exports (e.g., trade in components and finished military products) to the UK and Australia. However, commodities are increasingly less prominent in U.S. defense trade with the UK and Australia (and have been for some years) and present higher risks of diversion and greater impediments to law enforcement than defense services related to the personal interactions of leading U.S. and allied defense firms engaged in government-sponsored collaborative research.[52]

[52] For example, as a component of U.S. bilateral defense trade with the UK during fiscal year 2002, defense services (e.g., technical assistance) outpaced commodity exports by a factor of nearly 3:1—$6.6 billion in defense services versus $2.5 billion in defense commodities. See the report by the Department of State pursuant to Sec. 655 of the Foreign Assistance Act of 1961, covering fiscal year 2002 munitions exports pursuant to Sec. 38 of the Arms Export Control Act.

Appendix 1

Comparison of Military Export Controls In Key Areas

Area	United States	United Kingdom	Australia
Brokering	Controls any US person, *wherever located*, and any foreign person subject to US jurisdiction, for *all* military items.	Controls any UK person, *wherever located, for WMD* and instruments of torture, but for most *other military items only* when brokered *from UK territory* and only *for items situated outside of UK*. (open licenses available)	*Considering* controls on brokers operating *within Australia*.
Internal transfers to foreign persons	Controls transfers by US persons to foreign persons *whether in the US or abroad*.	Will not control.	Will not control.
Transshipment	Controls all temporary imports, including items in transit or transshipment.	Generally not controlled (where controls apply, open licenses available).	Unknown.
Technical Assistance	Controls technical data exports and *all forms* of technical assistance for *both conventional arms & WMD*.	Controls technical data exports, and *all forms* of technical assistance *for WMD* exports *outside EU* or EU embargoed countries. *Conventional arms assistance generally not controlled.*	Intends to establish controls over technical assistance.
Intangible Transfers	Controls transfer *by any means (including oral or visual disclosure) of all military items*.	Controls *oral and visual transfers only for WMD*; Controls for all items when by electronic means and telephone to extent a controlled document is read out.	Intends to establish controls over exports by any means.
Incorporated Technology	*Always controlled*, even when incorporated into other end items, including commercial items.	Military items incorporated into commercial end items generally *not controlled*.	Unknown.
Licensed Production	*Controls items produced* or derivative items, as well as original export of manufacturing data.	*Not controlled*, except for original export of manufacturing data.	Does not intend to control licensed production beyond original export of manufacturing data.

Appendix 2

Congress of the United States

Washington, DC 20515

March 16, 2000

The Honorable Madeleine K. Albright
Secretary of State
U.S. Department of State
Washington, D.C. 20520

Dear Madam Secretary:

We write with respect to ongoing discussions within the Administration regarding defense globalization, in particular efforts to revise the munitions export licensing process, and other export control issues.

We are fully supportive of expediting legitimate defense exports by improving the munitions licensing process. To that end, we have strongly supported efforts to provide additional resources over the past two fiscal years to the Office of Defense Trade Controls (ODTC) to help address the lack of personnel and other resources which are needed to improve the efficiency of the munitions licensing process. In the FY 2000 Foreign Relations Authorization Act, section 1309 mandated the provision of $9 million to ODTC for these purposes.

We are also fully supportive of addressing concerns raised by allied nations that the current munitions license process hinders defense cooperation between the U.S. and our friends in Europe, particularly as such cooperation relates to bilateral and multilateral projects that serve to enhance interoperability and coalition operations.

In this regard, we understand that it is the Administration's intent to move ahead with wide-ranging proposals to enhance transatlantic defense industry cooperation at the upcoming NATO ministerial in May.

As you consider such proposals, we want to make clear our adamant opposition to any proposal extending exemptions – i.e. a Canada-like exemption – to allied nations.

The current defense trade system, including the export control system governing munitions, is by law expressly subject to the continuous supervision and general direction of the Secretary of State under the Arms Export Control Act (AECA) and authorities that are vested in the President by the Act have virtually all been delegated to the Secretary, not other agencies. We believe that the AECA provides the appropriate structure under which the United States should continue to advance our foreign policy, national security and non-proliferation interests. State Department regulations and practice in implementing U.S. munitions laws, including the AECA, have long provided for individual, case-by-case licenses for defense exports. Yet, we understand that proposed exemptions, if extended as planned for NATO and other non-NATO allies, would except about eighty percent of commercial defense trade from licensing. Such exemptions are fundamentally inconsistent with the licensing scheme required by the AECA, and the legislative intent underlying the same.

Any decision to extend such exemptions, even in principle, should be made only when the recipient countries have in place an export control system comparable to that in the U.S. This means that such exemptions shall only be provided if a country has provided assurances in a legally binding document (e.g. through an exchange of notes) that details how such country will enact export control procedures that sufficiently conform to those of the United States and has drafted, promulgated and enacted necessary modifications to its laws and regulations.

The existing Canadian exemption should not be viewed as a useful model or precedent for exemptions for other allies. It exempts defense articles and services that will remain in Canada for its use, or be returned to parent corporations in the U.S. for further export. It is only justified because of the integration of our defense industries (with most recipients of defense articles and services in Canada being subsidiaries of U.S. companies) and because our neighbor to the north was historically expected to prompt fewer law enforcement problems due to license free exports. Other allies, on the other hand, need U.S. technologies to incorporate into their defense items and for re-export. Thus any exemption initially granted for allied use could be a step down a dangerous slope toward full exemption to re-export among favored allies or a free trade zone.

We are also concerned about the extent to which other proposals under consideration infringe upon the Secretary of State's prerogatives. It is important to ensure that such proposals will not result in additional diversions of technology and will not weaken, generally, enforcement of export controls and, specifically, the ability of the United States to prosecute and extradite persons that violate U.S. export control laws.

In accordance with such views, we therefore propose a moratorium on extending exemptions to other countries pending further review and consultations with our Committees to discuss the proposals under consideration to enhance defense globalization and cooperation by revising the munitions licensing process.

Again, we stress that we are supportive in principle of expediting legitimate defense exports to our close allies. However, any proposals must be subject to careful deliberations by all parties concerned, including our respective Committees, before any steps toward implementation are taken, or commitments made to other countries.

Thank you for your attention to this issue.

With best wishes,

Sincerely,

BENJAMIN A. GILMAN
Chairman
Committee on International Relations

JESSE HELMS
Chairman
Committee on Foreign Relations

SAM GEJDENSON
Ranking Democratic Member
Committee on International Relations

JOSEPH BIDEN
Ranking Democratic Member
Committee on Foreign Relations

Appendix 3

U.S. Department of Justice
Criminal Division

Office of the Deputy Assistant Attorney General — Washington, D.C. 20530

Mr. John D. Holum
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2201 C Street, N.W.
Washington D.C. 20520

Dear Mr. Holum:

I am writing to you on behalf of the Department of Justice to express our concerns about a Defense Department proposal to exempt from the licensing requirements of the Arms Export Control Act (the Act), exports of most defense articles and defense services to non-government end users in England and Australia. We believe that the creation of such an exemption will greatly impede the ability of the law enforcement community to detect, prevent and prosecute criminal violations of the Act, and that it will facilitate efforts on the part of countries and factions engaged in international terrorism to illicitly acquire sophisticated U.S. weaponry.

At present, commercial exports of military equipment and technology to non-government end users in England and Australia must be licensed by your Office of Defense Trade Controls (ODTC). In order to obtain a license, an exporter is required to submit a license application to ODTC identifying the articles to be exported, the ultimate and any intermediate consignees, and the articles; purported end use. Typically, a license application is filed with ODTC after lengthy and costly negotiations have taken place between the seller and an overseas purchaser.

The existence of the licensing requirement aids our enforcement efforts in several critical respects:

First, it creates an economic incentive for exporters to conduct background checks into the bona fides and representations of potential overseas customers, thereby increasing the likelihood that possible illicit procurement efforts will be detected and reported to law enforcement authorities. Legitimate firms typically will not enter into potentially protracted negotiations for the sale of weapons without first satisfying themselves that the end use and end user supplied by the foreign purchaser will ultimately be approved by the licensing officials in ODTC: These checks often provide the first indication that an illegal procurement effort is underway.

Second, the license requirement allows for thorough review of an arms transaction in advance of export, affording the government an opportunity to determine whether there is likelihood that the arms might be diverted or transshipped to a prohibited destination. Should a diversion scheme b uncovered, we can prevent the shipment and focus our efforts on prosecuting the parties who attempted to export the arms unlawfully.

And finally, the requirement makes it necessary for exporters intent on circumventing the law to take affirmative steps to evade the Act's proscriptions -- typically by lying on the license application or on shipping documents required to be filed with U.S. Customs at the time of export -- thus creating a domestic evidentiary trail upon which any ensuing prosecution can be based.

The proposed exemption would eliminate the license requirement and with it an invaluable enforcement tool. Exporters would no longer have an incentive to examine the backgrounds of their overseas

customers prior to shipping weaponry abroad; the government would have the ability to conduct only the most cursory examination of an export transaction prior to shipment; and we would have to depend on our foreign counterparts to obtain and provide the evidence needed to maintain successful prosecutions. In essence, our first line of defense against diversions would be moved across the oceans to England and Australia.

In this regard, we are concerned that the exemption will prompt foreign terrorist groups and other potential adversaries to set up store-fronts in England and Australia in order to take advantage of the relaxed export control requirements. We have seen this happen in Canada, a country already exempt from most U.S. export license requirements. England and Australia are not contiguous with the United States and likely would be viewed by hostile elements as being even more attractive locations from which to stage an illicit procurement effort.

I would appreciate it if you would pass along our concerns to the officials who are considering the proposed exemption. Should you have any questions, please feel free to contact me t your convenience.

Sincerely,

Bruce C. Swartz
Deputy Assistant Attorney General

Appendix 4

THE SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

MAY 5 2000

The Honorable Madeleine K. Albright
Secretary of State
2201 C Street Northwest
Washington, DC 20520

Dear Madeleine:

I am strongly convinced that the national security imperative for technology control remains undiminished. Regrettably, denial to rogue states and problematic governments has become more difficult over time as these states have taken advantage of the substantial increase in global trade to pioneer new avenues to gain access to sensitive technologies. To ensure the same degree of security in this changing security and business environment, we must devote more resources to blocking the flow of sensitive technologies to rogues and problematic governments and expand the consensus among our allies on technology control, and in particular on third-party retransfers.

Our staffs have been in discussion for nearly a year and have reached agreement on several incremental, procedural reforms to improve our controls. Still outstanding is the most important issue: whether to enhance our technology security through negotiation of a "Canadian-like ITAR exemption" with the UK and Australia. Only this change will expand the consensus with these key allies on enhanced export controls, create incentives for other countries to also improve their export controls, and allow us to redirect resources from low-risk to high-risk transfers. Announcement of this proposal, with the other incremental reforms, would be part of your package for the NATO Ministerial meeting this month.

I have found that DoD is spending too much effort controlling low risk items destined for low risk destinations at the expense of devoting more time to high-risk cases and issues. For example, nearly a third of the export license requests are destined for the UK and Australia, two historical allies with whom we share the most sensitive information and technology. Under current ITAR rules, my staff is processing these requests with the same approach that they give to export license requests destined for more problematic nations. Clearly, we could free up substantial resources to focus on more sensitive cases if we could agree upon an approach that is appropriate for the lesser risk associated with exports to the UK and Australia of unclassified information and equipment of low sensitivity.

Both the UK and Australia have technology security systems that are quite effective. There are some enhancements to their systems, however, that we have long sought. It is our view that the best way to accomplish this is through a US proposal to negotiate a Canadian-like exemption to the ITAR for UK and Australia.

The proposed exemption would apply only to certain unclassified items and services specifically *for end-use in UK and Australia only by nationals of each country.* While very important to industrial collaboration and defense cooperation, these items and services are of low sensitivity for proliferation and other concerns. All classified items and services exported to UK and Australia will continue to require licenses. Similarly, items controlled under the Missile Technology Control Regime, the Nuclear Suppliers Group or the Australia Group and other sensitive technologies, such as small arms and gas turbine "hot section" know-how and technology, will continue to require export licenses. This proposal would be conditioned on several measures: (1) formalized end-use and retransfer assurances; (2) control of "intangibles"; and (3) gap-filling changes to ensure congruency of export controls with those of the US. The ITAR proposal does not contemplate and would not establish a "defense free-trade zone" with these two nations in any meaningful sense of the term.

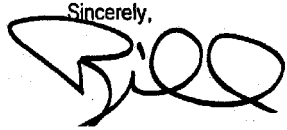
Some have suggested the ITAR exemption would eliminate all US Government control over exports that would no longer require licensing. That is not the case. In fact, the proposal would require legally binding agreements with the UK and Australia on tight third party retransfer controls and closure of other gaps. This strengthened retransfer control would extend to UK and Australian end-users for *all* US Munitions List items, not only items entering the UK and Australia under the proposed exemption. Our proposal would dramatically improve our control of third-party re-transfers, further enhancing national security.

We are working with the Justice Department to ensure that the proposal would strengthen US law enforcement. ITAR violations on the part of US exporters will be prosecuted irrespective of whether there is an ITAR exemption for UK and Australia. Also, end-use or retransfer violations on the part of UK or Australia end-users can be acted upon by the summary removal either of a specific end-user's eligibility under the exemption or by the removal or modification of the exemption itself—as was done with the Canadian exemption last year. As a result of US actions last year, Canadian officials are now strengthening their export control practices—an outcome that could not have been possible absent the ITAR exemption. Negotiating similar agreements between the US and the UK and the US and Australia would provide substantial US leverage on this key issue.

Finally, the creation of ITAR exemptions for the UK and Australia would—as we have seen in the case of the US/UK DoD/MOD Declaration of Principles—stimulate intense, beneficial competition among our other allies to improve their export controls, thus globally improving our technology security.

Technology security is a fundamental DoD concern on which I am personally involved. I believe that a "Canadian ITAR exemption" for the UK and Australia is the most important step we can take to significantly improve that security in the near term. I ask for your support.

Sincerely,



Appendix 5

THE SECRETARY OF DEFENSE

WASHINGTON, THE DISTRICT OF COLUMBIA

The Honorable Benjamin A. Gilman
Chairman, Committee on International Relations
U. S. House of Representatives
Washington, D.C. 20515-6128

June 28, 2000

Dear Mr. Chairman:

I am writing to express my deep concern over legislative proposals that can adversely impact the security of the United States. I refer specifically to proposals that would prohibit or significantly constrain the United States from negotiating with the United Kingdom and Australia measures to strengthen their export control procedures and better protect U.S. technology in exchange for an exemption to the U.S. International Traffic in Arms Regulation (ITAR) for the export to them of certain unclassified items.

As you are aware, on May 24th the Secretary of State announced at a meeting of NATO's North Atlantic Council an important U.S. initiative for the first major post-Cold War adjustment to the U.S. Defense Export Control system. The Defense Trade Security Initiative (DTSI) has at its heart the enhancement of U.S. national security and that of our allies through the improvement of export controls to ensure that advanced technology and other critical items do not reach unsafe hands in a globalized and interconnected world of asymmetrical threats. Needless to say, these export control changes also are essential to furthering interoperability with our allies in support of coalition operations.

One of the key initiatives is focused on allies who meet U.S. criteria for commonality and reciprocity in export controls and industrial security; have long-standing and successful cooperation in intelligence sharing and law enforcement; and guarantee reciprocal market access. Such an ally will be eligible for bilateral discussions on legally binding agreements to ensure their export control and technology security regimes are congruent to our own. In exchange for these ironclad arrangements, we are prepared to offer an exemption to the ITAR similar to that long-provided to Canada. While this exemption would apply only to certain unclassified technology and information, it would greatly facilitate closer defense industrial cooperation with the United States and improved interoperability of our combat forces.

The UK and Australia are two countries that have very good export control systems in terms of laws, procedures and actual practices. With a few, but important improvements, such as binding agreements on re-transfer and end use, export control of "intangibles," and the closing of other small gaps, both the UK and Australia would have control systems very similar and comparable in effectiveness to that of the United States. We believe the only way to achieve this commonality of control principles and enforcement standards is to negotiate a Canada-style exemption to the ITAR with the UK and Australia. This effort would effectively couple the largest economy in the world and the fourth largest economy plus Australia with congruent export control systems and provide for a dramatic increase in our global technology security.

Efforts to block or restrict this initiative to tighten the effectiveness of export controls would also harm our national security interests by blocking the powerful incentive our initiative creates for other allied governments to want to improve their export controls and technology security to match the United States. In addition to continuing to improve the effectiveness of our own export control system, we must effectively motivate our allies to improve their export controls. Regrettably, our track record to date using the traditional methods of setting the example and applying persuasion shows very little success.

In sum, I am very worried about any legislative actions that have the potential of preventing or unduly restricting the United States from negotiating improvements in the export control systems of our closest allies. Any statutory initiative that would do so would also remove an essential tool from our hands in our efforts to come to grips with one of the most vital security issues facing us today—how to protect advanced technology from reaching those who would do us harm while at the same time sharing that same technology with those who would help protect us. I solicit your support on this important security matter.

Sincerely,

Copy to:
The Honorable Sam Gejdenson

Appendix 6

One Hundred Eighth Congress

Congress of the United States
Committee on International Relations
House of Representatives
Washington, DC 20515

(202) 225-5021
http://www.house.gov/international_relations/

May 5, 2003

The Honorable Colin L. Powell
Secretary
U.S. Department of State
2201 C Street, N.W.
Washington, D.C. 20520

Dear Mr. Secretary:

I write with regard to the Department's proposed legislation for the Foreign Relations Authorization Act, Fiscal Years 2004-2005, wherein the Department seeks an amendment to the Arms Export Control Act that would permit the President to waive any or all of the statutory requirements established in section 38 of the Act relating to so-called "country exemptions."

The requirements set forth in section 38 govern the negotiation of international agreements, which must by law precede the establishment of any exemption in regulations permitting private United States persons to export munitions and arms-related technology to foreign persons located in "exempt" countries without U.S. Government review and approval through an export license. These requirements were enacted by Congress in section 102(a) of the Security Assistance Act of 2000 (Public Law 106-280) in order to ensure that United States security, foreign policy and law enforcement interests could be safeguarded through any such exemption from munitions export licensing. They were based on the specific policy objectives used by the previous Administration to justify this initiative to Congress.

Since then, separate negotiations of international agreements with Australia and the United Kingdom have been in progress for several years, and consideration is reportedly also being given in the Administration's NSPD-19 review of defense trade policies to negotiating an arrangement that would cover transnational defense companies located in France, Germany, Italy, Sweden, and Spain, as well as the United Kingdom. Based on informal representations made by Department officers to Committee staff, I understand the negotiations with Australia (completed we understand) and the United Kingdom (still continuing we understand) will not produce agreements that comport with the requirements of law. Yet, the extent to which this is

so is not clear as the Committee has only recently been provided with the negotiated texts (draft Australia text only). The Committee has not received any section-by-section analysis of what the agreements will and will not accomplish or other documentation. Nor has the Committee received any information on the status of the Administration's NSPD-19 review, other than anecdotal reports from representatives of the defense industry who are apparently participating in the NSPD review.

I hope you will agree that any change in law such as that proposed in the Department's draft legislation should only be undertaken, if at all, following careful consideration by the Congress of all relevant facts, including a full understanding of the details of the negotiations to date, and how the Administration might use any changes in law to establish more exemptions, in addition to what is contemplated for Australia and the United Kingdom. In this respect, enclosed please find an annex that constitutes an initial request for documents and information necessary to the Committee's consideration of this matter. The Committee requests that such documents be provided for Australia at this point. With regard to the United Kingdom, I ask that similar documents be provided once those negotiations are concluded.

I would note that among the documents requested, specifically the section-by-section analysis of the proposed agreement as it relates to current law, the Committee understands that a complete analysis of the "shortfalls" of the agreement may be difficult, given that Australia is at least 12 months away (according to the Australian Embassy) from enacting the necessary implementing legislation, and underscores perhaps that the "cart is being put before the horse" with regard to the proposed waiver.

This does not imply a lack of support for the objective of deepening defense cooperation with two of our closest allies, Australia and the United Kingdom. That is why, without prejudice to the eventual enactment of changes in law, the Committee is prepared to consider, when taking up this year's authorization act, other appropriate ways in which to facilitate bilateral cooperation with these two important countries.

More generally, Mr. Secretary, please permit me to raise with you the Committee's concern with the apparent trend towards relaxation of controls over munitions and other arms-related exports, a trend that seems unwise and particularly incongruous with the increased threats to U.S. security and foreign policy interests since the attacks of September 11, 2001. Recent efforts by certain governments to circumvent or evade the arms embargo on Iraq through the supply of spare parts for military systems and other relatively inexpensive items, such as night vision goggles, preceding the onset of Operation Iraqi Freedom, suggest very strongly the need for the United States to maintain a comprehensive and stringent system of control over all military exports, and to insist that other governments, particularly our friends and allies in Europe, do the same. In this regard, one of the reasons prompting enactment of statutory criteria in this area has been the spate of press and official reports in recent years, including some from

the Department, concerning illicit arms trafficking based in Europe that has largely gone unchecked, and which should be a source of serious concern to the United States and remedial action by the Department, in particular.

Further, lowering our country's standards for munitions and other arms-related transfers in part because it is advantageous to U.S. companies, can only make more complicated the already difficult job you have, Mr. Secretary, in persuading Moscow, Kiev, Beijing and others to pay less attention to weapons export earnings and more to tightening controls of their governments over those exports. The United States does not set a very high standard through a policy that makes arms exports "harder to keep track of," as stated in the Department's sectional analysis accompanying the proposal to modify section 38.

This is a moment in our Nation's history when it behooves us to strengthen, not relax, international standards for nonproliferation and military export controls. I hope that, upon examining this matter, you will come to a similar conclusion.

Thank you for your consideration of this important matter.

Sincerely,

HENRY J. HYDE
Chairman

HJH:jwr/wl
Enclosure

Annex

(1) Copies of all documents (including any annexes, side notes, interpretative letters, etc.) that will comprise the agreements (e.g., in the case of the United Kingdom, this would include – based on our understanding to date – the agreement, the MOU and the law enforcement MOU).

(2) Section-by-section analysis by State/L of all provisions of these documents, explaining their meaning; where and how they meet criteria of United States law, if they do; and in other instances, where and why they do not.

(3) Copies of the C-175 documents, including any memoranda of law, instruction and reporting telegrams and other papers that comprise the negotiating record.

(4) Description by State/L (and copies, if available) of any recent or proposed foreign laws and/or regulations that are intended to provide a basis for Australia or the United Kingdom for implementation of a United States licensing exemption.

(5) Description by State/PM of the proposed scope of the exemption(s), as envisaged in section 38(f)(2)(A) of the Arms Export Control Act, including a detailed summary of the defense articles, defense services, and related technical data covered by the exemption(s).

(6) Description by Justice of how the requirements of section 38(f)(2)(B) of the Act will be met.

(7) An outline and timetable for what remains to be done on the U.S. side and the foreign government side(s).

Appendix 7

United States Department of State

The Deputy Secretary of State

Washington, D.C. 20520

May 20, 2003

Dear Mr. Chairman:

Thank you for your letter regarding the Department's proposed legislation that would authorize ITAR exemptions for Australia and the United Kingdom. I appreciate your leadership in the Congress on technology control issues, and I look forward to continuing to work with you in the future on this and many other issues.

Let me assure you that in no way is this Administration "lowering our country's standards for munitions and other arms-related transfers," for any reason, much less "because it is advantageous to U.S. companies." To the contrary, we have succeeded with both the Australian and UK agreements in strengthening U.S. national security and our alliance with those two countries. These agreements will create a community of trusted and closely regulated defense companies that will be able to receive low-sensitivity unclassified defense exports from U.S. companies without a license, while meeting our responsibility to control U.S. defense technology. For the first time under the U.S.-UK agreement, the UK will take an affirmative obligation to assist us in enforcing our controls in the UK. In addition, the Department is investing in serious upgrades to our management, processes and information technology so as to fulfill our regulatory mandate in a more effective manner that advances our foreign policy and national security. Such improvements are long overdue.

We are processing your document request and will respond to you as soon as possible. In addition, as you consider legislative action in this area, I would ask that you personally meet

The Honorable
Henry J. Hyde, Chairman,
Committee on International Relations,
House of Representatives.

with senior representatives of the Departments of State and Defense to provide us the opportunity to brief you on the two agreements and how these comport with our priorities in building more robust defense export compliance partnerships with our principal defense allies. I agree with you on the importance of maintaining strong standards for nonproliferation and export controls at this critical point in our Nation's history.

Thank you for your interest and consideration.

Sincerely,

Richard L. Armitage

Appendix 8

United States Department of State

Washington, D.C. 20520

JUN - 4 2003

Dear Mr. Chairman:

I am writing to provide documentation related to agreements with the United Kingdom and Australia regarding country exemptions for defense export licensing, which you requested in your letter of May 5, to Secretary Powell.

I have attached a copy of the UK and Australia agreements (Tab 1) and a legal analysis (Tab 2) of those agreements. In addition, as requested there is a description of the applicable laws and regulations related to the UK agreement (Tab 3). (Australia is still working on its laws and regulations, and we do not have a copy of the drafts.) Attached also is a description of the proposed scope of the exemption (Tab 4), which is applicable to both the Australia and UK agreements, and a timetable of remaining steps on the U.S. and foreign government side (Tab 5). I am also including additional documents requested by the Senate Foreign Relations Committee staff, so that you and your staff have a complete set of documents that the Administration has provided to Congressional leaders regarding the UK and Australia agreements. This includes a glossary of terms for the U.K. agreement (Tab 6), and suggested legislative language (Tab 7).

Please note this package does not include a copy of the C-175 documents and other related documents - the Department, as a practice, does not release internal deliberative documents. As always, we stand ready to brief you on the history of our negotiations and are prepared to answer your questions and any concerns related to the negotiations. Please also be advised, we understand that the Department of Justice intends to respond to you directly with a description of how the requirements of section 38 (f)(2)(B) of the Act will be met.

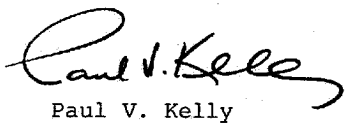
The Honorable
Henry J. Hyde, Chairman,
Committee on International Relations,
House of Representatives.

As you are aware, no country exemption will be considered for authorization until that country has implemented its export control commitments domestically. We look forward to providing the Committee with the notification and certification required by the Security Assistance Act of 2000 at that time.

As Deputy Secretary Armitage has noted in his May 20 letter to you, senior representatives of the Department of State welcome the opportunity to meet with you to answer your specific concerns and discuss how these agreements strengthen our defense export compliance partnerships with our chief defense allies.

Please do not hesitate to contact us if we can be of further assistance on this or any other matter.

Sincerely,



Paul V. Kelly
Assistant Secretary
Legislative Affairs

Attachments:

Tab 1 - Agreements with the U.K. and Australia

Tab 2 - Section by Section Legal Analysis

Tab 3 - Description of U.K. and Australian Laws

Tab 4 - Scope of the Exemption

Tab 5 - Timetable and Status of Talks

Tab 6 - Glossary of Terms

Tab 7 - Legislative Language

COMMENTS ON PROPOSED AUSTRALIAN & UK DEFENSE EXPORT AGREEMENTS

The following comments are provided in response to a letter of May 5, 2003 from Chairman Hyde of the House International Relations Committee requesting an analysis by State/L of the proposed defense export controls agreements between the United States and the United Kingdom (the "UK Agreement") and the United States and Australia (the "GOA Agreement"), respectively. Specifically, the letter requests with respect to each agreement a description, section by section, as well as an explanation concerning "where and how [these agreements] meet the criteria" of the relevant United States law, i.e., the Security Assistance Act of 2000 (SAA) (22 U.S.C 2778(j))(attached).

Although negotiation of both the agreement texts appears to have been completed, neither agreement has been either formally initialed or signed. Also, neither government has completed the process of promulgating or enacting the necessary laws and regulations to comply with obligations undertaken by them in these agreements -- as contemplated by the SAA.

In the absence of such domestic implementing laws and regulations, our ability to reach definitive conclusions concerning each agreement's meeting the criteria of the SAA is necessarily limited.[1]

The commentary below consists of three sections: first, a description of the requirements or criteria of the SAA; second, a section-by-section description of each provision of the UK agreement and the related MOUs, followed by analytic comments; and third, a section-by-section description of the Australian agreement, followed

[1] As noted, any analysis offered herein is necessarily preliminary, and could change once implementing measures undertaken by the GOA and the U.K. are fully assessed in their final form or in other circumstances, such as if different factual considerations were brought to bear subsequently upon the analysis. It is worth noting in this regard that the SAA requires -- before a country exemption from defense export licensing may be authorized for a country that has entered into the prerequisite defense export control agreement --that the President shall transmit to the Congress a certification that the U.S. has entered into such an agreement satisfying all the criteria of the SAA, and that the foreign country has "promulgated or enacted all necessary modifications to its laws and regulations to comply with its obligations under [that] agreement." The timing of the certification - after enactment of such laws and regulations - suggests further that any analysis at this stage is premature.

by specific analytic comments. In the section-by-section descriptions for each agreement, we have indicated the SAA criteria (or aspects thereof) potentially relevant to the section. The analytic comments after each sectional description identify both how various sections of that agreement match up to the SAA criteria, and other areas where the agreement and any MOU would, as the Department has previously acknowledged, warrant legislative relief from aspects of the SAA criteria. Our analysis confirms that the Department's request for legislative relief is a prudent course.[2]

SAA criteria:

The SAA sets out in Section 102 (attached), amending Section 38 of the Arms Export Control Act by adding a new subsection (j), requirements for a bilateral agreement that a foreign country must conclude with the U.S. to be eligible to qualify for a country exemption from U.S. defense export licensing requirements. The mandatory requirements are set out in subsection (j)(1) and 2(A). By way of summary, these mandatory SAA requirements or criteria include the following (with individual aspects italicized):

1. that the U.S. conclude a *binding bilateral agreement* with the foreign government (subsec. (j)(1(A)) (hereinafter "binding agreement" criterion);

2. that such agreement meet the requirements set forth in paragraph 2 (subsec. (j)((1)(A)(i));

3. that such agreement be *implemented* by the U.S. and the foreign country in a *manner that is legally binding under their domestic laws* (subsec.(j)(1)(A)(ii))(hereinafter "domestic law implementation" criterion);

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[2] Any assessment of the overall potential efficacy of an agreement's controls may involve more fact-based analysis by regulators with technical expertise. For example, such a fact-based analysis might be used to support a conclusion that the agreement viewed in its entirety provides for an export control regime that is comparable in effectiveness to that of the U.S., even if employing different means. Also, the commentary addresses however only the provisions of the two agreements and related MOUs. It does not speak to the limits to which the criteria of the SAA could potentially be interpreted, such as where other means or modalities of export controls that could factually be demonstrated to be capable of achieving the ends sought by the SAA, had been employed.

4. that the agreement shall require the country, as necessary, to *revise* its policies and practices, *and promulgate or enact necessary modifications to its laws and regulations to "establish an export control regime that is a least comparable to U.S.* law, regulation, and policy requiring" (subsec.(j)(2)(A)) (hereinafter "comparable export control regime" or "comparability" criterion);

(a) *conditions on the handling of all U.S. origin defense items, including prior written USG approval for any reexports* (subsec. (j)(2)(A)(i)) (hereinafter "comparable conditions on handling", "scope covering all U.S. origin", and "reexport approval" criteria);

(b) *end use and retransfer control commitments* including securing binding end use and retransfer control commitments *from all end users*, including such *documentation* as is needed *to ensure compliance and enforcement* with respect to such U.S. origin defense items (subsec. (j)(2)(A)(ii)) (hereinafter "retransfer and end use controls for all end users with respect to all U.S. origin defense items", and "documentation, compliance and law enforcement" criteria);

(c) establishment of a procedure comparable to a *watchlist* and full *cooperation with USG law enforcement* (subsec. (j)(2)((A)(iii) (hereinafter "watchlist procedure" and "law enforcement cooperation" criteria);…

(d) establishment of a *list of controlled defense items* to ensure coverage of those items to be exported under an exemption (subsec. (j)(2)(A)(iv))(hereinafter "control list" criterion).

Proposed UK Agreement

Sectional Description.

Article 1. This section provides that the parties agree that those defense articles, defense services and related tech data on the USML which are also on the UK Military List and such other instruments as the parties may conclude are "qualified defense articles" (or those to be

controlled under the agreement). (Control list criterion, #4(d).

Article 2. This section provides that the parties agree on developing a procedure to select those UK persons and entities that are qualified to be eligible to receive U.S. origin defense items exempt from licensing. Not a requirement of the SAA that only select persons be eligible for the exemption.

Article 3(a). In this section the UK provides that with respect to licensed U.S. origin qualified defense items, it shall maintain, through requirements of relevant UK laws, regulations, and policy, controls comparable in effectiveness to those that the U.S. applies, and notes that comparable effectiveness does not necessarily mean controls that are identical in all respects to those that the U.S. applies. (Comparability criterion, #4);

Article 3(b). In this section the UK agrees to cooperate and consult with the U.S. on their control systems. (aspects of the law enforcement criteria, #4(b) and (c);

Article 3(c). In this section the UK agrees to apply special provisions or procedures with respect to the handling of all U.S. origin qualified defense items by qualified persons and entities including: providing in legally binding [contractual] arrangements with such persons for end use and retransfer controls; providing in such arrangements for maintenance by the qualified persons of documentation concerning the exported items; auditing and inspecting of qualified persons; and, providing in such arrangements with qualified persons for them to provide prior notification to and secure approval by the U.S. exporter for all transfers to other qualified persons of license exempt U.S. origin defense items. (comparability and reexport criteria, #4 and 4(a), end use and retransfer and documentation criteria, #4(b)).

Article 4. This section cross references other understandings between the parties concerning retransfer. In this manner it refers to the politically binding Memorandum of Understanding (MOU) in which the UK has provided commitments concerning how it will recognize US requirements for reexport approval when issuing its own export licenses. (Reexport approval criterion, #4(a)).

Article 5. This section states an exemption that the UK already enjoys for official use under the U.S. International Trafficking in Arms Regulations (ITAR).

Article 6. Section in which parties agree to provide for criminal, civil and administrative penalties or sanctions, recognizing the differing circumstances and legal regimes of the Parties. (Comparability and conditions on the handling of U.S. exports and compliance criteria, #4, 4(a), and 4(b)).

Article 7. In this section the parties reaffirm law enforcement cooperation in accordance with the existing binding mutual legal assistance agreement and their customs cooperation MOU, and provide that they "shall strengthen" such cooperation, in accordance with the newly negotiated politically binding MOU on law enforcement cooperation." (Compliance and law enforcement criteria, #4(b) and (c)).

Articles 8, 9, 10, 11. These sections cover consultations, the agreement not affecting the ability of UK persons to receive licensed U.S. origin defense items, dispute resolution, and final clauses. (Does not relate to SAA criteria.)

MOU on USG reexport consent. In this MOU, the UK sets out mainly its politically binding commitment to require individual and general export licenses as appropriate for all exports to third countries, of U.S. origin qualified defense items, and acknowledges and will give the fullest weight to the U.S. requirement for prior written USG consent for re-export of such items in its licensing process. (Re-export, retransfer commitment and scope criteria, #4(a) and (b), with respect to all (including licensed) U.S. origin defense items).

Law Enforcement Cooperation MOU. In this MOU, the UK sets out its politically binding commitment to cooperate in deterring, detecting, investigating and prosecuting activities that would, in both countries, constitute breaches or violations of their defense export control laws or regulations if committed within their respective jurisdictions. (Law enforcement/cooperation criteria, #4(b) and (c).

Additional Analytic Comments.

As may be seen from the above sectional description, the UK agreement and the MOUs address in substance many of the SAA criteria. The Department has acknowledged nonetheless that questions may be raised concerning how fully areas of the UK agreement and MOUs may correspond to certain aspects of those SAA criteria and is seeking legislative relief in that regard. The following comments identify specific areas in which the UK agreement and MOUs address these SAA criteria as well as particular areas where questions may be raised.

The UK agreement would upon signature be considered a binding bilateral agreement. Article 3(a) of this agreement sets out a UK obligation to maintain controls "comparable in effectiveness" to those that the U.S. applies to qualified defense items. As noted, one aspect of the SAA comparability criterion also provides that conditions on handling apply to "all" United States origin defense items. Article 1 notes that the agreement covers those USML items, which are also included on the UK military lists and other instruments. This UK list and other instruments will be subject to limitations set by the EU. Hence, it appears that there will be a certain set of U.S.-origin defense items (e.g., on the general EU dual use list and hence that cannot be controlled by the UK) that will not be controlled pursuant to this agreement.

Criteria #4 (a) and (b) -- concerning re-export approval and end-use and retransfer commitment from all end-users with respect to all U.S.-origin defense items -- are addressed in various ways in the UK agreement and re-export MOU. The agreement provides in Article 3(c) that certain of these commitments on retransfers and end-use changes (both with third countries as well as for those within the U.K.) with respect to "qualified" persons and companies (those privileged to participate in the exemption and receive license-exempt items pursuant to contractual relationships with the U.K.) will be set out in contracts that the UK has assured us are binding under the UK common law, and there may be concerns regarding differences between such arrangements and those means of control that would apply under U.S. law. Furthermore, commitments regarding retransfer and end-use

changes within the U.K. by non-qualified persons are not addressed in the agreement.

Rather re-export/retransfer commitments for all other licensed U.S.-origin defense items handled by other, i.e., non-qualified, persons or companies are provided by the UK separately in a politically binding MOU. As noted above in the section-by-section description, this UK retransfer assurance is provided in the statement that the UK will require individual and general export licenses for exports to third countries and will "give the fullest weight" to the U.S. requirements, including that prior written U.S. consent be obtained, when issuing a U.K. export license that would involve U.S.-origin qualified defense items.

Compliance and law enforcement/cooperation criteria, #4(b) and (c), are addressed by the agreement's provision of a legally-binding commitment by the parties to cooperate under existing agreements and a customs MOU and "to strengthen their law enforcement cooperation, in accordance with domestic law and procedure, including under an Arrangement between the United States and the United Kingdom for Law Enforcement Cooperation on Defense Export Control Matters". The referenced law enforcement arrangement, which was negotiated by the Department of Justice as a politically binding MOU at the U.K.'s request, covers cooperation in deterring, detecting, investigating and prosecuting activities that would constitute export control violations in the respective jurisdictions of the U.S. and the U.K. In general, the commitment in the agreement "to strengthen law enforcement in accordance with domestic law and procedure" could be viewed as matching up to the SAA law enforcement criteria. The fact that the law enforcement cooperation arrangement is politically-binding and does not ensure cooperation for violations of U.S. law that are not violations of U.K. law could raise questions about how fully the provision corresponds to certain aspects of the SAA criteria regarding implementation and comparability.

The watchlist procedure criterion, #4(c), is addressed under the practice of utilizing intelligence and law enforcement information in the licensing review process and for monitoring trafficking. Such a procedure with the UK would appear, we understand from the regulators, to

flow, as a practical matter, from the law enforcement and other commitments provided for in the agreement and the MOU.

The control list criterion, #4(d), may be deemed satisfied by Article 1 of the UK Agreement. This article refers to those defense items that are to be covered under both the UK Military and U.S. Munitions lists. Insofar as a subset of such items would be those eligible for an exemption, the list appears designed "to ensure coverage of those items to be exported under the exemption," as the law contemplates.

As the Department has acknowledged, legislative relief would be desirable particularly insofar as

- certain U.S. origin defense items may not be covered by the UK agreement due to EU limitations affecting scope;
- certain re-export/retransfer commitments with respect to licensed items are addressed in the MOU, instead of the agreement itself;[3] and,
- retransfers and end use changes within the UK by non-qualified persons are not covered.

Our analysis supports the Department's conclusion that seeking legislative relief in these areas would be prudent.

Proposed GOA Agreement

Sectional Description.

Article 1. This section refers to the definitional annex.

Article 2. In this section, the parties recognize the high degree of commonality of coverage between the USML and the Australian Defence and Strategic Goods List, agree to consult if modifying their lists, and the GOA ensures it shall ensure coverage of all U.S. origin items to be exempt from licensing. (Control list and scope criteria, #4(d) and (a)).

[3] Potential concerns regarding implementation by contract for other commitments is noted earlier.

Articles 3 and 4. These sections relate to qualified persons eligible to receive exempt U.S. origin defense items, and procedures for selecting such persons. (Similarly, a draft MOU concerning the procedures for selecting qualified persons has been developed. Neither pertain to SAA requirements which do not provide that only select persons be eligible for the exemption.)

Article 5. In this section, the GOA agrees to require an export license for all exports (re-exports) of U.S. origin defense items (which requirement the agreement states cannot be met by a general license or exemption), to confirm that written USG reexport consent has been obtained before approving an Australian export license. Paragraph (b) lists circumstances conforming largely to existing ITAR exemptions when USG re-export authorization will not be required. (Re-export approval and retransfer commitment and scope criteria, #4, 4(a) and (b)).

Article 6. In this section, the GOA agrees to require of qualified persons (eligible for license exempt U.S. origin defense items) separate end use and retransfer (including transfers within Australia) commitments concerning licensed and license exempt U.S. origin defense items. (Re-export, end use and retransfer commitment criteria, #4(a) and (b)).

Article 7. This section provides for the adoption and maintenance by the GOA of appropriate criminal, civil and administrative penalties for violations of the relevant Australian export and intangible transfer laws, including legislative controls put in place to give effect to the obligations undertaken under the agreement. (Compliance and enforcement criterion, #4(b)).

Article 8. This section addresses matters not affected by the agreement, such as the ability of persons within Australia to be recipients of licensed U.S. origin defense items, military to military contacts, and certain otherwise exempt transfers. (Does not pertain to SAA criteria.)

Article 9. In this section the parties agree to cooperate in audits and inspections necessary to ensure compliance with the terms and purposes of the agreement; to cooperate in accordance with existing law enforcement agreements and MOUs; to deter, detect and prosecute

offenses under laws of the parties that give effect to the agreement's obligations; and the GOA agrees to provide the USG with timely access to documentation and records relevant to compliance, investigation or implementation of the agreement. (Law enforcement, compliance and documentation criteria, #4(b) and (c).)

Article 10. In this section the parties agree to continue to adhere to, and further through their respective export control regimes, responsible security policies. (Comparability criterion, #4).

Articles 11, 12, and 13. These sections set out provisions relating to holding consultations, notification of changes of laws that would affect the export control relationship referred to in the agreement, dispute resolutions, and final clauses. (Does not pertain directly to SAA criteria.)

Additional Analytic Comments.

The GOA agreement would upon signature be considered a binding bilateral agreement. It is expected, based on representations made by the GOA throughout the negotiations, that the GOA will implement the agreement in a manner that is "legally-binding under their domestic laws" -- by promulgating new laws and regulations to give effect to a new export control regime.

That said, as is apparent from the sectional description above, the GOA agreement satisfactorily addresses key SAA criteria in numerous respects, including by: requiring prior USG approval before authorizing re-export of all U.S. origin defense items; by providing for end use controls on U.S. origin items handled by qualified persons; and by providing for robust law enforcement. We understand from the regulators that the watchlist procedure criterion, #4(c), already exists both with regard to GOA licensing practices and ongoing law enforcement cooperation with the GOA. The control list criterion, #4(d), is also met by Article 2, which specifically provides that the GOA shall ensure coverage in its list of those items to be exported under the exemption.

Insofar as the GOA has not yet developed legislative and regulatory implementation modalities, we cannot yet

assess specifically how these precise implementation measures would match up to the criterion concerning domestic, legally binding implementation measures, #3. Similarly, we are advised that, prior to finalizing the agreement, the regulators will discuss with the GOA the coverage of Australian control lists to confirm representations that the lists are designed to apply controls to a scope of defense items comparable to that of the U.S., in order to ensure that there are no interim changes in either country's lists that could create problems for certifying the agreement.

As the Department has previously acknowledged, the agreement does not set out commitments with respect to licensed U.S.-origin defense items transferred, or with respect to which the end use is changed, within Australia by non-qualified persons, these transactions will remain subject to U.S. licensing controls. Thus, the Administration has sought in the Foreign Assistance Authorization bill reported out of the Senate Foreign Relations Committee on May 21, a provision that would permit an exception from these aspects of the criteria set out in subsection (j)(2). Our analysis supports the Department's conclusion that seeking legislative relief in that regard would be prudent.

Australian and UK Laws and Regulations

It is our understanding that Australia has not yet promulgated or enacted laws or regulations for purposes of implementing a country exemption to the ITAR defense export licensing requirements.

United Kingdom. We are aware the United Kingdom Export Control Act received Royal Assent on July 24, 2002. This Act permits the United Kingdom Secretary of State to impose export controls in relation to goods of any description and to impose transfer controls in relation to technology and technical assistance, subject to the terms of the Act. Her Majesty's Government has made available a Consultation Document on the draft orders on strategic export controls which are intended to implement the Act. We understand that these orders, which have not yet been enacted, provide for new controls on the transfer of military technology by electronic means and transfers of, as well as the provision of technical assistance in relation to, WMD.

ITEMS COVERED BY ITAR EXEMPTION

The basic parameters of an UK/Australia ITAR exemption would be the current Sec. 126.5 of the ITAR establishing the revised Canada ITAR exemption, which essentially defines which items would not be subject to an exemption. The following list provides an indication of what items would be subject to a future ITAR exemption for UK/Australia. It is not in itself a commitment and is provided as an unofficial description of items currently envisioned for an exemption. At any time, the U.S. Government reserves the right to change the content of an ITAR exemption for the UK or Australia.

II and III. Artillery and Projectiles **

Guns over .50 caliber, howitzers, mortars and recoilless rifles. Military flamethrowers and projectors. Also:

- Components, parts, accessories and attachments.
- Ammunition, including components, parts, accessories and attachments (except for firearms).
- Ammunition belting and linking machines (except for firearms).
- Ammunition manufacturing machines and ammunition loading machines (except hand-loading).

IV. Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs and Mines (except those on the MTCR Annex)

Including:

- Launchers for these items (except MTCR Annex).
- Apparatus, devices, materials for the handling, control, activation, monitoring, detection, protection, discharge or detonation of these items (except MTCR Annex).
- Military explosive excavating devices.
- Components, parts, accessories, attachments and associated equipment (except MTCR Annex).

V. Explosives, Propellants, Incendiary Agents and Their Constituents **

- Military explosives.
- Military fuel thickeners.
- Propellants for articles in Categories II and IV (except MTCR Annex).
- Military pyrotechnics, except pyrotechnic materials having dual military and commercial use.
- All compounds specifically formulated for articles in this category.

VI. Vessels of War and Special Naval Equipment **

- Warships, amphibious warfare vessels, landing craft, mine warfare vessels, patrol vessels and any vessels specifically designed or modified for military purposes.
- Turrets and gun mounts, arresting gear, special weapons systems, protective systems, submarine storage batteries, catapults, mine sweeping equipment (including mine countermeasures equipment deployed by aircraft) and other significant naval systems specifically designed or modified for combatant vehicles.
- Harbor entrance detection devices (magnetic, pressure, and acoustic) and controls therefor.
- All specifically designed or modified components, parts, accessories, attachments, and associated equipment.

(Note: The ITAR exemption would not include naval nuclear propulsion equipment or related equipment.)

VII. Tanks and Military Vehicles **

- Military type armed or armored vehicles, military railway trains, and vehicles specifically designed or modified to accommodate mountings for arms or other specialized military equipment or fitted with such items.
- Military tanks, combat engineer vehicles, bridge launching vehicles, half-tracks and gun carriers.
- Self-propelled guns and howitzers.
- Military trucks, trailers, hoists, and skids specially designed, modified, or equipped to mount or carry firearms, artillery or missiles, or for carrying and handling of ammunition.
- Military recovery vehicles.
- Amphibious vehicles.

- Engines specifically designed or modified for the above (except for those in the bullet beginning "military trucks").
- All specifically designed or modified components and parts, accessories, attachments and associated equipment.

VIII. Aircraft and Associated Equipment **

- Military aircraft engines, except reciprocating engines, specifically designed or modified for military aircraft.
- Cartridge-actuated devices utilized in emergency escape of personnel and airborne equipment (including but not limited to airborne refueling equipment) specifically designed or modified for use with military aircraft or engines.
- Launching and recovery equipment for military aircraft.
- Inertial navigation systems, aided or hybrid navigation systems, Inertial Measurement Units (IMUs), and Attitude and Heading Reference Systems (AHRS), except for those on the MTCR Annex.
- Ground effect machines (GEMs), including but not limited to surface effect machines and other air cushion vehicles, and all components, parts and accessories, attachments and associated equipment specifically designed or modified for use with such machines.
- Components, parts accessories, attachments and associated equipment (including ground support equipment) specifically designed or modified for the above or complete military aircraft.

(NOTE: The ITAR exemption would not cover complete military aircraft, including but not limited to helicopters, non-expansive balloons, drones and lighter-than-air aircraft that are specifically designed, modified or equipped for military purposes. It would also not cover developmental aircraft, engines and components thereof.)

IX. Military Training Equipment **

- Military training equipment including but not limited to attack trainers, radar target trainers, radar target generators, gunnery training devices, antisubmarine warfare trainers, target equipment, armament training units, operational flight trainers, air combat training systems, radar trainers, navigation trainers, and simulation devices related to defense articles.

- Components, parts, accessories, attachments and associated equipment.

X. Protective Personnel Equipment **

- Body armor specifically designed, modified or equipped for military use.
- Articles, including but not limited to clothing, designed, modified or equipped to protect against or reduce detection by radar, infrared (IR) or other sensors.
- Miiltary helmets equipped with communications hardware, optical sights, slewing devices or mechanisms to protect against thermal flash or lasers, excluding standard military helmets.
- Partial pressure suits and liquid oxygen converters used in military aircraft.
- Protective apparel and equipment specifically designed or modified for use with toxicological agents or equipment or radiation equipment.
- Components, parts, accessories, attachments and associated equipment.

XI. Military Electronics **

Electronic equipment (not included under the following heading) specifically designed, modified or configured for for military application, including but not limited to:

- Underwater sound equipment to include active and passive detection, identification, tracking and weapons control equipment.
- Underwater acoustic active and passive countermeasures and counter-countermeasures.
- Radar systems with capabilities such as: search, acquisition, tracking, moving target identification, imaging radar systems, ground air traffic control radar (except for MTCR Annex).
- Electronic combat equipment such as: active and passive countermeasures, active and passive counter-countermeasures, and radios (including transceivers) specifically designed or modified to interfere with other communication devices or transmissions.

- Command, control and communications systems to include radios (transceivers), navigation, and identification equipment (except for MTCR Annex).
- Computers specifically designed or developed for military application and any computer specifically modified for use with any defense article on the US Munitions List. (MTCR Annex items are not included in the exemption.)
- Any experimental or developmental electronic equipment specifically designed or modified for military applications or specifically designed or modified for use with a military system (except MTCR Annex).
- Electronic systems or equipment specifically designed, modified, or configured for intelligence, security, or military purposes for use in search, reconnaissance, collection, monitoring, direction-finding, display, analysis and production of information from the electromagnetic spectrum and electronic systems designed or modified to counteract electronic surveillance or monitoring (except MTCR Annex).
- Components, parts, accessories, attachments and associated equipment.

XII. Fire Control, Range Finder, Optical and Guidance and Control Equipment **

- Fire control systems: gun and missile tracking and guidance systems; gun range, position, height finders, spotting instruments and laying equipment; aiming devices (electronic, optic and acoustic); bomb sights, bombing computers, military television sighting and viewing units, and periscopes for articles in this section.
- Lasers specifically designed, modified or configured for military application, including those used in military communication devices, target designators and range finders, target detection systems, and directed energy weapons.
- First and second generation image intensification tube and first and second generation image intensification night sighting equipment.
- Inertial platforms and sensors for weapons or weapon systems; guidance, control and stabilization systems; astro-compasses and star trackers and military accelerometers and gyros.
- Components, parts, accessories, attachments and associated equipment.

XIII. Auxiliary Military Equipment **

- Cameras and specialized processing equipment therefor, photointerpretation, stereoscopic plotting, and photogrammetry equipment.
- Military Information Security Systems and equipment, cryptographic devices, software, and components.
- Self-contained diving and underwater breathing apparatus controlled on the USML.
- Carbon/carbon billets and preforms.
- Concealment and deception equipment, including but not limited to special paints, decoys and simulators and components, parts and accessories therefor.
- Energy conversion devices for producing electrical energy from nuclear, thermal, or solar energy, or from chemical reaction that are specifically designed or modified for military application.
- Chemiluminescent compounds and solid state devices.
- Devices embodying particle beam and electromagnetic pulse technology and associated components and subassemblies.
- Metal embrittling agents.
- Hardware and equipment associated with the measurement or modification of system signatures for detection of defense articles (e.g., signature measurement equipment, prediction techniques and codes, signature materials and treatments, and signature control design methodology).

XV. Space Systems and Associated Equipment **

- Commercial communications satellites.
- Ground control stations for telemetry, tracking and control of spacecraft or satellites.
- Global Positioning System (GPS) receiving equipment specifically designed, modified or configured for military use, but for UK and Australian government end-users only.

**** It is important to understand that, even if an item is included on the above listings, an ITAR exemption cannot be used in the following circumstances:**

- For any classified articles, technical data and services.

- Defense services, except as described in s. 126.5(c).
- Any transaction involving the export of defense articles and services for which Congressional notification is required.

STATUS OF ITAR EXEMPTION TALKS WITH THE UK AND AUSTRALIA

UNITED KINGDOM

- Agreement reached on May 16, 2003
- Consultation period on UK Export Control Act Secondary Legislation completed April '03.
- Qualified company contracts (being drafted).
- Exchange of Notes concerning revision to the UK export application form. The new form will include a check-in-the-box asking the applicant if any U.S. content is included in the proposed export. If the applicant answers yes, the form will instruct them to provide written proof that prior USG content has been obtained. Any fabrication of the UK export application is a breach of UK export control law and a punishable offense that could include criminal sanctions.
- Exchange of Notes concerning Joint Compliance and Implementation Board (being drafted).
  The JCIB provides a forum for the USG and HMG to track and monitor proper execution of the ITAR exemption.
- HMG must pass agreement through UK Parliament as a treaty.
- Executive Branch provides to Congress advance certifications required by Section a(1)(A)(3) and the notification of exemption required by Section b of the Security Assistance Act.
- Executive Branch drafts regulatory change to the ITAR and publishes change in the Federal Register.

AUSTRALIA

- Agreement reached on December 5, 2003
- Qualified Company MOU drafted in January '03. Currently under USG interagency review.

- Australia must pass new Defense legislation to put into effect commitments made under the legally binding bilateral export control agreement.

- Australia currently preparing legislative package for submission to their parliament. As is the case with the UK, the Australia ITAR agreement must be passed through their parliament as a treaty.

- Australia believes the treaty will go into force in Spring '04

- Executive Branch provides to Congress advance certifications required by Section a(1)(A)(3) and the notification of exemption required by Section b of the Security Assistance Act.

- Executive Branch drafts regulatory change to the ITAR and publishes change in the Federal Register.

UK ITAR EXEMPTION AGREEMENT GLOSSARY OF TERMS

Defense Item: Defense articles, defense services and related technical data

Qualified Defense Item: defense articles, defense services and related technical data on the USML which are also included on the UKML and any such other instruments as the parties may conclude. ("any such other instrument" is intended to reference the fact that some UKML is subject to licensing controls under Annex IV of the EU Dual Use List.)

U.S. Origin Qualified Defense Item: Refers to those qualified defense items exported to the UK that will be subject to the controls set forth in the agreement. The term U.S. origin qualified defense items captures both U.S. licensed and licensed exempt defense articles, services and related technical data.

Exempt Qualified Defense Items: U.S. origin defense items exported to the UK from the United States without a license. For the purposes of the agreement, Exempt Qualified Defense Items can only originate from the United States. U.S. origin qualified defense items exported to the UK from any country other than the United States can not be considered an Exempt Qualified Defense Item. For clarity purposes, the term is often referred to in the agreement as U.S. origin exempt qualified defense items.

U.S. Licensed Origin Qualified Defense Item: As noted in Article 3(a), are those U.S. Origin Qualified Defense Items exported to the UK under an ITAR export license as opposed to a license exemption. Note that the word licensed immediately follows U.S. to specify that the licensing authority is the U.S. and not the U.K.

Qualified Persons and Entities: UK persons and entities, in addition to HMG, that the U.S., taking into account advice from HMG, authorizes to receive Exempt Qualified Defense Items. The U.S. shall adopt and maintain a list of UK Qualified Persons and Entities for the purposes of the agreement.

Legally Binding Arrangements with Qualified Persons and Entities: Refers to the legally binding contractual agreements to be signed between HMG and the UK qualified persons and entities that put into effect special control

provisions and procedures with respect to the handling of all U.S. origin qualified defense items.

Section 233 of the Foreign Assistance Act of 2003 is amended as follows:

In the caption:

-- on page 75, lines 14 - 16, in the caption after "REQUIREMENTS FOR", strike the remainder of the caption, and insert in lieu thereof "AUSTRALIA AND THE UNITED KINGDOM".

In the text:

-- on p. 75, lines 17 & 18, after "EXCEPTION", strike "ON TRANSFERS WITH AUSTRALIA" and insert in lieu thereof "FOR AUSTRALIA AND THE UNITED KINGDOM";

-- on p. 75, line 22: after "(5) EXCEPTION FROM BILATERAL AGREEMENT REQUIREMENTS.", insert "(A) AUSTRALIA.";

-- on p. 76, line 1: after the word "transfers", insert "or changes in end use"; and,

-- on p. 76, line 4: after "after the agreement enters into force.", add the following new subparagragh (B):

"(B) UNITED KINGDOM. The requirements for a bilateral agreement described in paragraphs (1)(A)(ii) and 2(A)(i) and (ii) of this subsection shall not apply to an agreement between the U.S. Government and the United Kingdom."

Rationale:

- The Administration took a different approach in negotiating a bilateral agreement provided for in section 38(j) of the AECA partly at the UK's request. While the approach results in the UK's regulatory regime being significantly enhanced, the approach is not in all respects that contemplated by Sec 38(j) of the AECA.

- This approach applies controls comparable in effectiveness through contractual arrangement with qualified companies with respect to both licensed and license-exempt items.

- Thus, while the overall bilateral agreement is legally binding, aspects such as the general commitment to implement retransfer/reexport controls with respect to all qualified items are necessarily narrower in scope and do not include "all" items on the USML. This is because some items on the USML are considered "dual-use" by the European Union, and EU treaty commitments preclude member states from imposing controls on some of these dual-use items when they are transferred or exported within the EU. As a result, for this relatively small number of USML items (none of which would be included under an ITAR exemption for the UK), the UK government cannot control the re-export of these items (whether they have US content or not) to other EU members. It should be noted that this is currently the case with the same items exported from the US to the UK under license, with the US relying upon its own licenses enforceable under U.S. law and regulation but not under the laws or regulations e of the United Kingdom) to preclude the unauthorized retransfer of these items to other countries.

- The Security Assistance Act requires legally binding controls on the retransfer of US origin defense items. In the UK agreement, a politically binding retransfer/ reexport MOU applies to all US origin defense items subject to UK Government control. Other control commitments with respect to those eligible to receive license-exempt items, are implemented by contractual arrangements binding under UK law. It should be noted that, in the absence of the ITAR exemption agreement, the UK government provides no formal commitment (legally or politically binding) on the retransfer or re-export of US origin defense items except when they are owned by the UK Government itself.

- The Administration considers valid the UK assessment that its controls are comparable in effectiveness to warrant an exemption, which will necessarily be limited in scope to items UK is authorized to control.

- Legislative relief is needed, however, to adapt the approach taken with the UK to provisions of US law, and to permit the Administration to conclude an agreement that will provide the basis for an exemption with the US' most steadfast ally.

Appendix 9

One Hundred Eighth Congress

Congress of the United States
Committee on International Relations
House of Representatives
Washington, DC 20515

(202) 225–5021
http://www.house.gob/international_relations/

June 25, 2003

The Honorable Colin L. Powell
Secretary
U.S. Department of State
2201 C Street, N.W.
Washington, D.C. 20520

Dear Mr. Secretary:

Thank you for the material that was furnished to the Committee on International Relations by letter dated June 4, 2003, from Assistant Secretary Paul V. Kelly, concerning the proposal to exempt Australia and the United Kingdom from arms export license requirements.

In order to aid in the Committee's further analysis of this material, I request the Department's written responses to the questions attached hereto. It would be helpful to receive the responses as soon as possible in order to set the stage for a detailed discussion with Department officials pursuant to Deputy Secretary Armitage's request for such a meeting.

Sincerely,

HENRY J. HYDE
Chairman

Enclosure:
As stated

COMMITTEE ON INTERNATIONAL RELATIONS

Subject: Initial Questions Concerning Department of State's June 4, 2003 Document Submission Relating to ITAR Waivers for Australia and the United Kingdom

General Policy Matters

(1) Since the U.S. arms export license process has consistently produced any necessary licenses for export of most unlicensed low sensitivity items (understood for this purpose to mean export applications not requiring staffing to other offices) to Australia and the UK within a 10-day period for the past two years, would the Department provide a concise statement regarding the problem it is trying to fix through these arrangements? Would it also address in that statement how any gains it perceives that may serve to justify associated risks to law enforcement, homeland security and other U.S. interests (e.g., prior consent to re-transfers) presented by these alternative arrangements to traditional forms of control under United States law and regulations?

(2) Is the Department prepared to state a definitive position at this time concerning whether it will explore additional country exemptions in the future or terminate the policy (as opposed to a "pause" or moratorium) with exemptions for Australia and the UK?

(3) Please furnish the Committee with all intelligence reports since January 1, 2001, that relate to the diversion or planned diversion of any defense articles and defense services involving the UK or Australian persons or companies.

(4) Does the Department intend to vet all eligible foreign end users for Australia and the UK with the intelligence community and law enforcement agencies? If so, has the Department obtained any commitments from these agencies to conduct the necessary checks?

(5) What are the projected costs to the U.S. Government and to U.S. industry of the procedures mandated in the proposed UK and Australia arrangements?

Scope of Waiver and Controls Lists

(6) Deputy Secretary Armitage's letter to the Chairman dated May 20, 2003, states: "These agreements will create a community of trusted and closely regulated defense companies that will be able to receive low-sensitivity unclassified defense exports ... without a license" (emphasis added). Section 47(9) of the Arms Export Control Act states that "significant military equipment"

means articles "(A) for which special export controls are warranted because of the capacity of such articles for substantial military utility or capability; and (B) identified on the United States Munitions List." Would the Department agree that references to "unclassified low sensitivity" items could not reasonably be understood as encompassing items designated under U.S. law and regulation as significant military equipment? If so, will the Department revise its June 4th submission concerning the scope of waiver, in keeping with Deputy Secretary Armitage's assurance, to remove all SME items and furnish the Committee with a revised document reflecting this change? If the Department declines to make this change, please explain why and revise the June 4th submission to annotate all items currently designated as SME?

(7) A January 18, 2001, joint statement released by the UK MOD concerning the January 17 visit of Baroness Symons to Washington says "...the United States has stated that it is prepared to revise its International Traffic in Arms Regulations to permit the export to qualified companies in the United Kingdom of most unclassified defence technology without a license." Is this statement still accurate? Since unclassified technology generally accounts for more than 98 percent of all munitions licenses in a given year, what percent of licensed defense trade to Australia and the UK in fiscal year 2002 would have been unlicensed had the country exemptions proposed by the Department been in place?

(8) For those U.S. Munitions List items to be exempt pursuant to the arrangements with the UK and Australia, please identify for each country: (i) those items routinely referred to the Department of Defense under current guidelines; (ii) the percent of those items referred to Defense that result in a Defense recommendation for approval without conditions and the percent for approval under specified conditions (i.e., "provisos"); and (iii) the percent of all items referred to Defense for Australia and the UK that result - (A) in unconditional approvals, and (B) in conditional approvals.

(9) Please furnish the Committee with: (i) the expert level analysis relating to comparability of the Australian and UK control lists with the U.S. Munitions List upon which the Department is basing its conclusion regarding the statutory criteria; (ii) a copy of the ADSGL; (iii) confirmation that neither list requires additions to make them congruent to the USML; (iii) a list of all USML items controlled by the UK as dual-use items and the UK licensing policy for each of these items (e.g., no license required ("NLR") worldwide, NLR for EU, etc.); and (iv) a copy of Annex IV to Council Regulation (EC) No. 1334/2000.

(10) Please confirm: (i), as stated in a May 5, 2000, letter previously made available to the Committee from former Secretary Cohen to former Secretary Albright, that all items controlled under the MTCR, Nuclear Suppliers Group and the Australia Group, will continue to require export licenses, and (ii) that the scope of waiver document furnished to the Committee on June 4th excludes all such items. If the scope of waiver includes such items and the Department's position is to maintain their inclusion, please revise the document to annotate these items and indicate by which regime they are controlled.

(11) Please also confirm, as stated in the same letter from Secretary Cohen, that access under both arrangements will be "only by nationals of each country."

(12) As the proposed scope of waiver provided to the Committee on June 4th appears to exclude any and all items from Category I and Categories XIII-XXI of the USML, would the Department please confirm that such items are excluded or amend the June 4th submission. Please also confirm that only those items identified in Category XII of the June 4th submission are included and that there were no inadvertent omissions.

(13) Please confirm, or amend the June 4th submission accordingly, that the following areas will be excluded in their entirety for Australia and the UK (in addition to those items specified for exclusion to Canada at § 126.5(b)(1)-(20), for which the Committee is also seeking confirmation of exclusion):

-- all defense services (except as may be specified in the agreements);
-- all U.S. defense industry employment by Australian or British nationals;
-- all transfers that may occur outside of Australia or the United Kingdom, as the case may be, including in the United States, by any means of exempt U.S. defense items to qualified Australian or UK persons or entities;
-- all classified material or information;
-- all defense items requiring prior notification to Congress; and
-- all permanent and temporary imports into the United States.

Law Enforcement Interests

(14) As the UK MOU on law enforcement developed by DOJ appears to rest on dual criminality as a predicate to UK cooperation, please explain how a civil contract between a UK government agency and a private British person or entity compels UK government cooperation on law enforcement matters under the arrangement?

(15) Relatedly, please explain the legal basis on which the UK government could compel the timely cooperation of a private British person or entity under a civil contract, other than through civil injunctive relief granted by an English court or another judgment in favor of HMG, and whether the UK Government has an established record of success in relying on this type of legal arrangement for these specific matters, or whether the proposed arrangement is essentially novel and untested?

(16) Has the State Department obtained Justice Department advice or opinion with respect to whether the contractual scheme envisaged in this arrangement presents any complications to U.S. civil enforcement actions against UK persons or entities on the grounds of strict liability, double jeopardy or otherwise?

(17) The Committee understands the exemption for Canada currently has more than 2,000 locations in Canada eligible to receive U.S. defense articles exempt from licensing. How many locations are anticipated for the UK and Australia? Is there any ceiling?

(18) In light of GAO's report concerning lessons to be learned in the Canada exemption, has the Department sought the opinion of the Department of Homeland Security ("DHS") regarding the impact of the proposed waivers on U.S. Customs' inspections responsibilities, and whether there is any additional burden involved that would detract from other Customs priorities or for which additional resources by Customs will be needed? If so, please describe DHS' response. Has the Department updated its guidance to Customs concerning Canada since the GAO report?

(19) Given the absence of any successful record of prosecution in the United States involving illegal export activities in instances where no license was required under regulation, has the Department queried U.S. law enforcement agencies, including the Justice Department and U.S. Attorneys, to determine if there are any charges (i.e., criminal counts) associated with ongoing law enforcement investigations that would be adversely affected by establishment of the waivers?

U.S. Government Consent Requirements

(20) Please explain the reason(s) given by the UK Government for its unwillingness to provide in this arrangement a legally binding commitment to the U.S. Government with regard to the necessity of prior written consent for third party transfers and changes in end use?

(21) Please explain why the arrangements contain no legally binding commitments by either the UK or the Australian government concerning non-transfer and end use and the requirement for the U.S. Government's prior written consent over these matters as they pertain to U.S. defense items where the governments, themselves, are the recipients (as distinct from where their private defense companies are recipients and what may be required of them pursuant to these arrangements).

(22) Since the Department appears not to have obtained any legally binding commitments from Australia or the UK to seek the prior written consent of the U.S. government for third party transfers or changes in end use regarding their own use and disposition of U.S. defense items, please explain the rationale for the Department's acceptance of language in Article 5 of the negotiated Australian text and in Article 5 of the UK MOU that delineates areas for which USG authorization shall not be required. Please include in this rationale the basis in U.S. law for accepting such a prohibition absent any level of assurance from either government.

(23) Concerning Article 5 of the UK MOU (and, in certain instances, comparable provisions in the Australia text), please provide the Committee with a considered legal analysis of the scope and meaning of the U.S. commitments. For example --

-- What does "in this context" mean? Does this have a specific meaning or is it meant to imply that the preceding commitments by the UK are being undertaken as part of a larger set of commitments that includes the U.S. undertakings in paragraph 5(a)-(e)?

-- From whom is the U.S. Government barred from seeking re-export or retransfer authorization -- UK recipients or any other government from which the UK may wish to acquire US origin defense items?

-- Does the prohibition applicable to the United States in the first clause of Article 5(a) extend to all US defense items (whether sold, licensed or exempt) and to any government or person that might retransfer US defense articles to the UK?

-- if so, how is this permitted under U.S. law?

-- What does the second clause of article 5(a) mean in referring to the "capability" or "effectiveness" of the UK's armed forces? Does this mean that the U.S. Government would forfeit its right to consent to retransfer of US origin defense items from any other third party including any third government in circumstances in which the UK deems it necessary to its "effectiveness"?

-- Similarly, what is the scope of the U.S. commitment with respect to "any forces directly co-operating with those (UK) forces"? Could this be understood to mean that, at any future point, any third country armed forces fighting with the UK in any future conflict (whose identity, time or place are not required to be made known under this commitment?) could similarly determine that the acquisition from of U.S. origin defense items is covered by this prohibition by reason of "capability" or "effectiveness"?

-- Does Article 5(b) forfeit United States rights with respect to the use of US defense articles or services by countries to which the United States maintains an arms embargo? How is this consistent with certain U.S. laws which prohibit the export (including temporary export) of U.S. defense articles, such as, for example, the launch from the PRC of a British or European scientific satellite (e.g., arguably, an "official" UK purpose), containing USML controlled components?

-- Please explain the legal basis for negotiating such overly broad prohibitions on United States rights, which under current law are intended to be asserted and protected -- and in certain instances required to be asserted and protected.?

(24) What is the basis in United States law for a private U.S. exporter, rather than the USG, to provide approval for third party transfers pursuant to these arrangements? Has the Department sought advice or opinion from the Justice Department regarding whether any such approvals are enforceable under United States law?

UK Agreement

(25) Please describe the changes, if any, in UK law or regulation that the UK Government has agreed to make specifically in response to the U.S. proposal for an ITAR waiver (as distinct from changes that are being made in fulfillment of EU, G-8 or other UK commitments unrelated to the ITAR waiver, such as implementation of certain changes recommended by Lord Scott).

(26) Does the Department have a draft of the civil contract the UK would use with qualified firms it will share with the Committee at this time? Can the Department describe any requirements it has provided, or will provide, to the UK?

(27) Please explain the meaning of the term "UK persons and entities" and describe its legal and practical application under the proposed agreement, including insofar as it may concern access to U.S. defense items by UK citizens, UK dual-nationals, EU nationals, and other third party foreign nationals, including employees of UK entities?

(28) Given the Parliamentary record of concern that the UK arms export process may not have a well-developed system for monitoring of its arms exports (beyond ad hoc queries to British Embassies relating to "use" for human rights monitoring purposes), please explain the basis for the Department's affirmative conclusion of comparability on this point, as well as the Department's understanding as to the scope and criteria of the DTI watch list compared with that of the United States.

(29) Please explain why the UK does not plan to control export of armaments manufactured in another country under UK-licensed production arrangements and how the Department factored this into its overall assessment of comparability, if it all?

(30) Please advise whether UK implementation of the draft agreement will include an order to revoke or amend all existing open licenses concerning the requirement to obtain U.S. Government consent to retransfers or change in use?

(31) Similarly, please advise whether the UK will publish an order to prevent incorporation of U.S.-origin defense items into dual-use end items or systems, and any related issues regarding the application of de minimus or "transformation" of technology rules that may be applicable to the preservation of United States interests?

(32) Please address whether Article 1(a) excludes a situation where a defense item is incorporated into a dual-use item and, therefore, subject in most instances to EU dual-use rules? If not, please explain how U.S. Government consent rights are protected?

(33) Also concerning Article 1(a), are there any "other instruments" in place or envisaged at this time? If so, please describe.

(34) Since Article 2 provides for U.S. development and maintenance of a list of UK persons and entities, what is the reason for not subjecting those persons and entities to U.S. jurisdiction pursuant to a written arrangement directly with the U.S. Government (as opposed to the contractual arrangement envisaged with the UK government)?

(35) Why is there no counterpart in the UK arrangement to Article 5(a)(i) of the Australia agreement, which excludes use of general licenses and exemptions for satisfying U.S. retransfer consent?

Australia Agreement

(36) Please explain whether changes to Australia's export control laws and regulations relating to military exports will include:

(i) Control over brokering of conventional weapons and, if so, whether GOA control will extend to Australians wherever located or more closely resemble the UK approach?;

(ii) Control over defense services relating to conventional weapons and, if so, whether the control will be as extensive as that of the United States; e.g., extend to technical assistance, as well as licensed production; include conduct associated with publicly available information, etc., or is more likely to resemble the limited approach taken by the UK in this area?;

(iii) Control over transfers of conventional weapons technology "by any means," or likely to be reflective of the limited approach to "intangibles" taken by the UK (e.g., emails, facsimile messages and reading documents over the telephone)?;

(iv) Control over all exports of goods produced in a foreign country under licensed production or manufacturing arrangements?; and

(v) other areas relevant to comparability?

(37) Given Australia's apparent decision not to control internal (i.e., in-country) transfers of defense items and since its defense industry is increasingly foreign owned or controlled (e.g., foreign acquisitions of OPTUS, Ltd. and Australian Defence Industries or "ADI"), please explain whether an ITAR waiver agreement (if approved by the Congress):

(i) could undermine some or all of the legal arrangements in place between the U.S. Government and third-country foreign firms relating to end use controls of U.S. controlled defense items?; and

(ii) whether the proposed ITAR agreement could be an impediment to establishing future such arrangements in the event of additional third country industry acquisitions?

(38) Concerning Article 5(a)(i), what incorporated items are not subject to Australian legal jurisdiction? Why are such items not excluded from the agreement?

(39) In article 4.1.3 of the MOU concerning qualification of Australian recipients, why does the GOA retain the sole right to revoke eligibility of a person or entity from receiving US defense items without a license? How does such an arrangement protect U.S. interests and how is this consistent with appropriate exercise of the authority provided to the Secretary regarding suspension or revocation of licenses in section 42 of the Arms Export Control Act?

Appendix 10

United States Department of State

Washington, D.C. 20520

www.state.gov

JUL 25 2005

Dear Mr. Chairman:

This letter is in response to your letter of June 25 requesting written responses to questions concerning the Department's proposal to exempt Australia and the United Kingdom from certain license requirements of the International Traffic in Arms Regulations.

Enclosed please find an attachment containing both your questions and the Department's corresponding answers. We have also submitted a hard copy of Annex IV of the EU dual use list as requested. This response is complete, save the five questions that have been referred to the Departments of Defense, Justice and Homeland Security. We hope that you and the members of the Committee will find this response helpful.

Please contact us if we can be of further assistance.

Sincerely,

Paul V. Kelly
Assistant Secretary
Legislative Affairs

Enclosures:
As stated.

The Honorable
Henry J. Hyde, Chairman,
Committee on International Relations,
House of Representatives.

UNCLASSIFIED

COMMITTEE ON INTERNATIONAL RELATIONS

Response to Initial Questions
Concerning Department of State's
June 4 Document Submission
Relating to ITAR Waivers
for Australia and the United Kingdom

General Policy Matters

(1) Since the U.S. arms export license process has consistently produced any necessary licenses for export of most unlicensed low sensitivity items (understood for this purpose to mean export applications not requiring staffing to other offices) to Australia and the UK within a 10-day period for the past two years, would the Department provided a concise statement regarding the problem it is trying to fix through these arrangements? Would it also address in that statement how any gains it perceives that may serve to justify associated risks to law enforcement, homeland security and other U.S. interests (e.g., prior consent to re-transfers) presented by these alternative arrangements to traditional forms of control under United States law and regulations?

ANSWER: Categorizing extension of ITAR exemptions to the UK and Australia as a means to "fix a problem" with our licensing of low-sensitivity defense items to these countries suggests that these ITAR exemptions are strictly process initiatives. Although the ITAR exemptions will allow our licensing staffs to concentrate on higher-risk exports, the real benefit is that they involve a new construct in the defense trade relationship with two of our most important allies.

The ITAR exemption agreements with the United Kingdom and Australia significantly benefit U.S. national security in several respects including by enhancing those governments' export controls (e.g., by controlling defense services and intangible transfers). In addition, they will provide incentives for greater defense cooperation leading to enhanced war-fighting capabilities and interoperability with two of our closest allies.

We do not accept the question's premise that there are "associated risks to law enforcement, homeland security and

other US interests" that need to be offset under the ITAR exemption agreements. Unlike the old (pre-2001) Canada ITAR exemption, which placed no limits on the Canadian entities that could receive US defense items without a license, the agreements with the UK and Australia limit the scope of the exemption to these governments and specific companies ("qualified persons" or "entities"). Not only will the USG have a role in selecting these companies (in the case of the UK agreement, the USG alone will ultimately choose the entities), but the agreements require the qualified persons to enter into legally binding contractual commitments regarding the handling of all U.S.-origin defense items, both exempt and licensed. So unlike licensed trade that is handled almost exclusively through contractual arrangements between commercial entities and U.S. regulation applicable to U.S. commercial entities, with limited foreign government involvement, the UK and Australia ITAR exemption agreements create binding government-to-government and government-to-qualified entity partnerships that are intended to expand upon U.S. regulatory controls beyond what exists today for licensed trade.

(2) Is the Department prepared to state a definitive position at this time concerning whether it will explore additional country exemptions in the future or terminate the policy (as opposed to a "pause" or moratorium) with exemptions for Australia and the UK?

ANSWER: The Department cannot state a definitive position at this time concerning whether to explore additional country exemptions in the future or terminate the policy as opposed to enacting a pause or moratorium. This issue is currently being discussed within the interagency as part of the NSPD-19 process, so the Secretary has not yet made a final decision.

(3) Please furnish the Committee with all intelligence reports since January 1, 2001, that relate to the diversion or planned diversion of any defense articles and defense services involving the UK or Australian persons or companies.

ANSWER: Requests to furnish intelligence reports should be made to the intelligence community. Moreover, it is

important to state again that the scope of UK and Australia ITAR exemptions will be limited to select qualifying firms. The USG will carefully consider all available information, including intelligence information, in determining which foreign companies should be allowed to use the exemptions.

(4) Does the Department intend to vet all eligible foreign end users for Australia and the UK with the intelligence community and law enforcement agencies? If so, has the Department obtained any commitments from these agencies to conduct the necessary checks?

ANSWER: The Department will vet all U.K. and Australian firms designated as eligible to use the exemption and will request the Intelligence Community to review this draft list. As we do not now have such a list, the intelligence agencies have not been specifically contacted to undertake this tasking. This vetting will occur prior to these firms being placed on the list of qualified firms and will include any subsidiaries that are also designated as eligible. The Department will use its existing watchlist of suspect parties as a starting point to conduct this vetting, and the watchlist already incorporates relevant information from intelligence community reports. In addition to vetting against the watchlist, the Department will also consult with U.S. law enforcement as is currently the practice with all U.S. registrants.

(5) What are the projected costs to the U.S. Government and the U.S. industry of the procedures mandated in the proposed UK and Australia arrangements?

ANSWER: We anticipate the projected costs to the USG and U.S. industry of the procedures mandated in the proposed UK and Australia ITAR arrangements will be comparable to those associated with the Canada exemption. U.S. industry will continue to be required to keep records of their transactions against the exemption. The costs to the USG for regulating these exemptions should arguably decrease as AES goes on line this Fall, thus enabling us to better track and monitor exports.

Scope of Waiver and Controls Lists

(6) Deputy Secretary Armitage's letter to the Chairman dated May 20, 2003, states: "These agreements will create a community of trusted and closely regulated defense companies that will be able to receive low-sensitivity unclassified defense exports…..without a license" (emphasis added). Section 47 (9) of the Arms Export Control Act states that "significant military equipment" means articles " (A) for which special export controls are warranted because of the capacity of such articles for substantial military utility or capability; and (B) identified on the United States Munitions List." Would the Department agree that references to "unclassified low sensitivity" items could not reasonably be understood as encompassing items designated under U.S. law and regulation as significant military equipment? If so, will the Department revise its June 4th submission concerning the scope of waiver, in keeping with Deputy Secretary Armitage's assurance, to remove all SME items and furnish the Committee with a revised document reflecting this change? If the Department declines to make this change, please explain why and revise the June 4th submission to annotate all items currently designated as SME?

ANSWER: The scope of items that can be exported to the UK and Australia governments and qualified persons under the exemptions would be similar to that under the Canada exemption (Sec. 126.5 of the ITAR), which has for many decades included some types of Significant Military Equipment (SME). The main difference is that there may be carve-outs from the list of exempted items to the extent either the UK (or Australia) cannot control the item itself. A principal purpose of extending ITAR exemptions to the UK and Australia is to promote greater levels of defense cooperation with these allies and enhance U.S.-allied warfighting capabilities and interoperability. It is therefore fully consistent to include some SME (i.e., those articles that have capacity for substantial military utility or capability) as part of the scope of an ITAR exemption. We believe the special exports controls warranted for export of SME are captured in the binding agreements. Moreover, the UK and Australia exemptions will exclude all classified defense items as well as specific categories of unclassified exports of special sensitivity, such as MTCR annex items and night-vision equipment.

(7) A January 18, 2001, joint statement released by the UK MOD concerning the January 17 visit of Baroness Symons to Washington says…"the United States has stated that it is prepared to revise its International Traffic in Arms Regulations to permit the export to qualified companies in the United Kingdom of most unclassified defense technology without a license". Is this statement still accurate? Since unclassified technology generally accounts for more than 98 percent of all munitions licenses in a given year, what percent of licensed defense trade to Australia and the UK in fiscal year 2002 would have been unlicensed had the country exemptions proposed by the Department been in place?

ANSWER: The Department stands by the January 18, 2001 joint statement released on the occasion of Baroness Symons visit to Washington. Most types of unclassified defense technology will be covered by the UK and Australia exemptions, although this may or may not mean that most actual exports to those countries might go under the exemptions.

Our data show that for CY 02, had an ITAR exemption been in place for Australia, roughly 55% of licensing approvals could have been exempted (depending upon whether the recipients were qualified to use the exemption).

Our data show that for CY 02, had an ITAR exemption been in place for the UK, roughly 33% of the licensing approvals could have been exempted (again, depending upon whether the recipients were qualified to use the exemption).

(8) For those U.S. Munitions List items to be exempt pursuant to the arrangements with the UK and Australia, please identify for each country: (i) those items routinely referred to the Department of Defense under current guidelines; (ii) the percent of those items referred to Defense that result in a Defense recommendations for approval without conditions and the percent for approval under specified conditions (i.e., "provisos"); and (iii) the percent of all items referred to Defense for Australia and the UK that result - (A) in unconditional approvals, and (B) in conditional approvals.

ANSWER: For those U.S. Munitions List items potentially subject to an ITAR exemption, we have determined that for defense exports to the UK in CY '02:

(i) 628 cases were referred to DoD under current guidelines

(ii) 301 cases (48%) referred to DoD were approved without conditions. 313 cases (50%) were approved with provisos. 14 cases were neither listed as approvals should be "nor" provisos.

For those U.S. Munitions List items potentially subject to an ITAR exemption, we have determined that for defense exports to Australia in CY '02:

(i) 215 cases were referred to DoD under current guidelines

(ii) 77 cases (36%) referred to DoD were approved without conditions. 137 cases (64%) were approved with provisos. 1 case was listed as without action.

(iii) The approximated percent of all items (843) referred to Defense for Australia and the UK:

325 cases (39%) were approved without conditions
518 cases (61%) were approved with provisos

It should be noted that those cases that were referred to DOD and adopted with provisos were in a context where we did not have the special protections provided under the ITAR exemption agreements. In the context of those measures, the Departments of State and Defense are fully comfortable with approving the exports of items subject to an exemption to the UK and Australia governments and qualified firms without interagency referral or provisos.

(9) Please furnish the Committee with : (I) the expert level analysis relating to comparability of the Australian and UK control lists with the U.S. Munitions List upon which the Department is basing its conclusion regarding the statutory criteria: (ii) a copy of the ADSGL; (iii) confirmation items controlled by the UK as

dual-use items and UK licensing policy for each of these items (e.g., no license required ("NLR") worldwide, NLR for EU, etc.); and (iv) a copy of Annex IV to Council Regulations (EC) No. 1334/2000.

ANSWER: The expert analysis requested above for items (i) and (iii) is being worked by the Defense Trade and Security Administration (DTSA). The Department will submit DTSA's findings to the Committee as soon they are furnished. We anticipate DTSA will forward its submission within days.

The Department is unable to provide the Committee as copy of the ADSGL at this time since the GOA has withdrawn it for revision. The Australians report that a new ADSGL is "imminent."

A copy of Annex IV to Council Regulations (EC) No. 1334/2000 can be downloaded from the Council of the European Union security related export controls page at http://europa.eu.int/pesc/ExportCTRL/en/Index.htm

(10) Please confirm: (i), as stated in a May 5, 2000, letter previously made available to the Committee from former Secretary Cohen to former Secretary Albright, that all items controlled under the MTCR , Nuclear Suppliers Group and the Australia Group, will continue to require export licenses, and (ii) that the scope of waiver document furnished to the Committee on June 4th excludes all such items. If the scope of waiver includes such items and the Department's position is to maintain their inclusion, please revise the document to annotate these items and indicate by which regime they are controlled.

ANSWER: As stated in the May 5, 2000 Cohen-Albright letter, all items controlled by the Missile Technology Control Regime (MTCR), the Australia Group, and the Nuclear Suppliers Group, to the extent that they are encompassed by the U.S. Munitions List, will continue to require a license issued by the Department of State for export to the United Kingdom and Australia. Categories XIV (Toxicological Agents, Including Chemical Agents, Biological Agents, and Associated Equipment) and XVI (Nuclear Weapons, Design and Testing Related Items) are excluded in their entirety from the scope of the exemption, as are all MTCR items covered by the various categories of the U.S. Munitions List. Accordingly, the exclusion of these items from the scope of

the waiver document furnished to the Committee on June 4 is confirmed.

(11) Please also confirm, as stated in the same letter from Secretary Cohen, that access under both arrangements will be " only by nationals of each country."

ANSWER: Access to ITAR controlled licensed exempt defense items under the Australia agreement is limited to Australian citizens with at least a RESTRICTED security clearance and a legitimate need for having such access. Access to ITAR controlled licensed exempt defense items under the UK agreement is limited to UK nationals.

(12) As the proposed scope of waiver provided to the Committee on June 4th appears to exclude any and all items from Category I and Categories XIII-XXI of the USML, would the Department please confirm that such items are excluded or amend the June 4th submission? Please also confirm that only those items identified in Category XII of the June 4th submission are included and that there were no inadvertent omissions.

ANSWER: The Department can confirm that items from the following categories are excluded from the scope of the exemption: Categories I, XIV, and XVI-XXI inclusive. The June 4 submission included information that Categories XIII Auxiliary Military Equipment) and XV (Spacecraft Systems and Associated Equipment) are included in the scope of the exemption. As submitted on June 4, the scope of the exemption for these categories as follows:

XIII. Auxiliary Military Equipment **

- Cameras and specialized processing equipment therefor, photointerpretation, stereoscopic plotting, and photogrammetry equipment.
- Military Information Security Systems and equipment, cryptographic devices, software, and components.
- Self-contained diving and underwater breathing apparatus controlled on the USML.
- Carbon/carbon billets and preforms.

- Concealment and deception equipment, including but not limited to special paints, decoys and simulators and components, parts and accessories therefor.
- Energy conversion devices for producing electrical energy from nuclear, thermal, or solar energy, or from chemical reaction that are specifically designed or modified for military application.
- Chemiluminescent compounds and solid state devices.
- Devices embodying particle beam and electromagnetic pulse technology and associated components and subassemblies.
- Metal embrittling agents.
- Hardware and equipment associated with the measurement or modification of system signatures for detection of defense articles (e.g., signature measurement equipment, prediction techniques and codes, signature materials and treatments, and signature control design methodology).

XV. Space Systems and Associated Equipment **

- Commercial communications satellites.
- Ground control stations for telemetry, tracking and control of spacecraft or satellites.
- Global Positioning System (GPS) receiving equipment specifically designed, modified or configured for military use, but for Australian and UK government end-users only.

**** It is important to understand that, even if an item is included on the above listings, an ITAR exemption cannot be used in the following circumstances:**

- For any classified articles, technical data and services.
- Any MTCR annex items (even if not specifically identified on the following list).
- Defense services, except as described in s. 126.5(c).
- Any transaction involving the export of defense articles and services for which Congressional notification is required.

The Department also affirms that the list of items from Category XII identified in the June 4 submission is complete and omits no item currently eligible for the exemption.

(13) Please confirm, or amend the June 4th submission accordingly, that the following areas will be excluded in their entirety for Australia and the UK (in addition to those items specified for exclusion to Canada at 126.5(b) (1)-(20). For which the Committee is also seeking confirmation of exclusion):

- all defense services (except as many be specified in the agreements);

ANSWER: all defense services (except as specified in the agreements and those limited defense services permitted under ITAR Sec 126.5 para (c)(6)) are excluded.

- all U.S. defense industry employment by Australian or British nationals;

ANSWER: access by Australian and British national employees of U.S. defense firms, unless they are the employees of subsidiaries of those U.S. firms located in the UK/Australia that are themselves qualified persons, is excluded from the exemption. The agreements permit the sharing with, or transferring exempt qualified defense items to, United States persons who are employees of qualifying persons or entities.

- all transfers that may occur outside of Australia or the United Kingdom, as the case may be, including in the United States, by any means of exempt U.S. Defense items to qualified Australian or UK persons or entities.

ANSWER: all transfers that may occur outside of Australia or the UK, as the case may be, including in the United States, by any means of exempt U.S. defense items to qualified Australian or UK persons or entities are excluded. All transfers of exempt items between qualified companies, unless specifically excepted in the agreements, require prior U.S. consent.

- all classified material or information;

ANSWER: all classified material or information are excluded from the exemptions.

- all defense items requiring prior notification to Congress;

ANSWER: all defense items requiring prior notification to Congress are excluded from the exemptions.

- and all permanent and temporary imports into the United States.

ANSWER: all permanent and temporary imports into the United States except for those circumstances that otherwise qualify for an exemption under U.S. regulations are excluded from the exemptions.

All items currently specified for exclusion under the Canada ITAR exemption 126.5 (b)(1)-(20) are to remain excluded items.

Note: In the case of the UK ITAR exemption, additional USML unclassified defense items will be excluded beyond those required for exclusion under the Canadian and Australia ITAR exemptions. These additional USML items are those items to which the UK does not apply licensing controls either under the UKML or Annex IV of the EU dual use list.

Law Enforcement Interests

(14) As the UK MOU on law enforcement developed by DOJ appears to rest on dual criminality as a predicate to UK cooperation, please explain how a civil contract between a UK government agency and a private British person or entity compels UK government cooperation on law enforcement matters under the arrangement?

ANSWER: The Department of Justice is working on a response to this question. DoJ will then coordinate its response through the Department.

(15) Relatedly, please explain the legal basis on which the UK government could compel the timely cooperation of a private British person or entity under a civil contract,

other than through civil injunctive relief granted by an English court or another judgement in favor of HMG, and whether the UK Government has an established record of success in relying on this type of legal arrangement for these specific matters, or whether the proposed arrangements is essentially novel and untested?

ANSWER: We understand that the primary basis of enforcement of the civil contracts would be through injunctive relief and/or damages. We are not aware of whether the UK Government has an established record of success in relying on these types of relief.

(16) Has the State Department obtained Justice Department advice or opinion with respect to whether the contractual scheme envisaged in this arrangement presents any complications to U.S. civil enforcement actions against UK persons or entities on the grounds of strict liability, double jeopardy or otherwise?

ANSWER: The Department of Justice is working on a response to this question. DoJ will then coordinate its response through the Department.

(17) The Committee understands the exemption for Canada currently has more than 2,000 locations in Canada eligible to receive U.S. defense articles exempt from licensing. How many locations are anticipated for the UK and Australia? Is there any ceiling?

ANSWER: Neither agreement imposes any ceiling on the number of qualified firms, nor do we see any reason to do so. However, we expect that the number of qualified firms in both the UK and Australia will be significantly smaller than the number of registered companies in Canada. The UK anticipates that roughly a half dozen to a dozen major UK defense firms that have "List X" sites (i.e. sites authorized by MoD to handle classified materiel) will initially apply for qualified company status. Based on the recorded success of the first round of qualified companies, the UK in consultation with the USG will consider additional applications.

A precondition for Australian companies to be eligible for ITAR qualified status is that they be members of the

Defence Industrial Security Program (DISP) and capable of protecting ITAR exempt material in their possession. At present there are 364 companies in the DISP. The GOA believes there could be between 400 and 600 companies that might seek access to the ITAR exemption.

(18) In light of GAO's report concerning lessons to be learned in the Canada exemption, has the Department sought the opinion of the Department of Homeland Security ("DHS") regarding the impact of the proposed waivers on U.S. Customs' inspections responsibilities, and whether there is any additional burden involved that would detract from other Customs priorities or for which additional resources by Customs will be needed? If so, please describe DHS' response. Has the Department updated its guidance to Customs concerning Canada since the GAO report?

ANSWER: The Department of Homeland Security is working on a response to this question. DHS will then coordinate its response through the Department.

(19) Given the absence of any successful record of prosecution in the United States involving illegal export activities in instances where no license was required under regulations, has the Department queried U.S. law enforcement agencies, including the Justice Department and U.S. Attorneys, to determine if there are any charges (i.e. criminal counts) associated with ongoing law enforcement investigations that would be adversely affected by establishment of the waivers?

ANSWER: The Department of Justice is working on a response to this question. DoJ will then coordinate its response through the Department.

U.S. Government Consent Requirements

(20) Please explain the reasons given by the UK Government for its unwillingness to provide in this arrangement a legally binding commitment to the U.S. Government with regard to the necessity of prior written consent for third party transfers and changes in end use.

ANSWER: The UK government would not provide us a legally binding commitment with regard to U.S. requirements to obtain prior written consent for transfer of U.S. defense items to third party destinations and changes in end use because it argued to do so would infringe on UK sovereignty including by unacceptably fettering the discretion of the UK Secretary of State for Trade and Industry to make licensing determinations.

U/S Bolton agreed to accept from HMG the politically binding retransfer and end use commitment contained in the MOU because he views a politically binding assurance from our closest ally as being of sufficient force and efficacy. Particularly in the context of the commitments contained in the MOU, we are fully confident that the UK government will make every effort not to permit the retransfer of U.S.-origin defense items without the consent of the USG, absent extraordinary circumstances, in which case the UK would consult before issuing an export license.

(21) Please explain why the arrangements contain no legally binding commitments by either the UK or the Australian government concerning non-transfer and end use and the requirement for the U.S. Government's prior written consent over these matters as they pertain to U.S. defense items where the governments, themselves, are the recipients (as distinct from where their private defense companies are recipients and what may be required of them pursuant to these arrangements).

ANSWER: The Government of Australia informs us that GOA exports of military equipment are also subject to its licensing process and are therefore subject the commitments contained in Article 5. The GOA notes that this was recently the case when Australia re-exported C-130 aircraft to the United States. In addition, subject to treaty ratification, the GOA also considers itself bound by Article 6 of the agreement.

Even though the text of the UK agreement addresses primarily retransfer consent for exports of U.S. origin defense items by private entities, the text can be interpreted to require U.S. retransfer consent for any re-exports from the UK, including by the government itself. The Government of the United Kingdom has scrupulously respected the U.S. requirement for retransfer consent of

items under its direct control. Particularly in the context of the special relationship established by the ITAR exemption agreement, we are even more confident this will remain so. The UK agreement was crafted to ensure protection of items under the control of its firms, including regarding the UK government's licensing of retransfers. The Department believes the exception clauses listed in Article 5 of the GOA agreement and UK MOU clearly denote those limited circumstances where we have allowed some flexibility in meeting our prior consent requirements. We believe the exception clauses are further indications of each government's commitment to abide by our requirements in all other circumstances.

(22) Since the Department appears not to have obtained any legally binding commitments from Australia or the UK to seek the prior written consent of the U.S. government for third party transfers or changes in end use regarding their own use and disposition of U.S. defense items, please explain the rationale for the Department's acceptance of language in Article 5 of the negotiated Australian text and in Article 5 of the UK MOU that delineates areas for which USG authorization shall not be required. Please include in this rationale the basis in U.S. law for accepting such a prohibition absent any level of assurance from either government.

ANSWER: As noted in the answer to question #21 above, the Government of Australia considers the legally binding provisions of Articles 5 and 6 to cover the re-export and end use of defense items under its direct control. The UK is discussed in #23 below. Nevertheless, regarding the specific sections of the Australia agreement:

Australia Art 5(b)(i): The rationale for this provision is that it does not involve any change in ownership nor does it involve any change in end-use, which remains the same as previously (originally) authorized.

Australia 5(b)(ii): The basis for this provision is ITAR Sec 123.9 and Sec. 3(b) of the Arms Export Control Act.

Australia 5(b)(iv): The basis for this provision is Sec. 124.2 of the ITAR. In considering this provision

of the Australia agreement, we asked ourselves under which circumstances we might not authorize an Australian qualified person to repair an unclassified NATO/Japan/Australia defense article operated in Australia, and we could not think of one. We therefore saw no reason not to approve such repairs in advance as contemplated in this section of the agreement. Note that the definition of "repair" in the annex excludes any upgrade or enhancement to the capability of the item being repaired. This would continue to require a license or TAA.

(23) Concerning Article 5 of the UK MOU (and, in certain instances, comparable provisions in the Australia text), please provide the Committee with a considered legal analysis of the scope and meaning of the U.S. commitments. For example:

-- What does "in this context" mean? Does this have a specific meaning or is it meant to imply that the preceding commitments by the UK are being undertaken as part of a larger set of commitments that includes the U.S. undertakings in paragraph 5(a)-)(e)?

ANSWER: The phrase "in this context" is used since we considered our intent not to seek re-export or transfer authorization in the circumstances outlined to be related substantially to the preceding UK commitments, although not provided as a basis in exchange for those commitments.

-- From whom is the U.S. Government barred from seeking re-export or retransfer authorization, UK recipients or any other government from which the UK may wish to acquire US origin defense items?

ANSWER: With respect to 5(a), the U.S. does not intend to seek re-export or transfer authorization from the UK Government (since the UK Government is the only entity that could claim UK defense purposes). With respect to 5(b), the U.S. does not intend to seek re-export or transfer authorization from UK qualified persons or entities. With respect to 5(c), the U.S. does not intend to seek re-export or transfer authorization from UK qualified persons or entities as is true of 5(d).

-- Does the prohibition applicable to the United States in the first clause of the Article 5 (a) extend to all US defense items (whether sold, licensed or exempt) and to any government or person that might retransfer US defense articles to the UK?

ANSWER: The provision in 5(a) is intended only to apply to items that the UK Government holds for UK defense purposes and therefore is limited in application to subsequent transfers by the UK Government. When we export to the MOD for military or defense purposes, we do not seek re-export authorization from the UK when the UK takes the items outside the country for military operations because such activity does not constitute an export.

--if so, how is this permitted under U.S. law?

ANSWER: To the extent that the provisions in paragraph 5 track U.S. regulations, they already exist as exemptions. None of the provisions of this or any other section of the UK or Australian agreement is precluded by U.S. law.

--What does the second clause of article 5 (a) mean in referring to the " capability" or "effectiveness" of the UK's armed forces? Does this mean that the U.S. Government would forfeit its right to consent to retransfer of U.S. origin defense items from any other third party including any third government in circumstances in which the UK deems it necessary to its "effectiveness"?

ANSWER: No. The terms "capability" and "effectiveness" are intended as an elaboration of the meaning of "UK defense purposes."

--Similarly, what is the scope of the U.S. commitment with respect to "any forces directly co-operating with those (UK) forces"? Could this be understood to mean that, at any future point, any third country armed forces fighting with the UK in any future conflict (whose identity, time or place are not required to be made known under this commitment) could similarly determine that the acquisition from of U.S. origin defense items is covered

by this prohibition by reason of "capability" or "effectiveness"?

ANSWER: No, the only person who can invoke the benefit of this provision is the UK Government/MOD.

--Does Article 5(b) forfeit United States rights with respect to the use of the US defense articles or services by countries to which the United States maintains an arms embargo? How is this consistent with certain U.S. laws which prohibit the export (including temporary export) of U.S. defense articles, such as, for example, the launch from the PRC of a British or European scientific satellite (e.g., arguably, an "official" UK purpose), containing USML controlled components?

ANSWER: No. It is consistent because, if not already, it will be elaborated in the US regulations which preclude such items from going to embargoed countries.

--Please explain the legal basis for negotiating such overly broad prohibitions on United States rights, which under current law are intended to be asserted and protected - and in certain instances required to be asserted and protected.?

ANSWER: As noted with regard to the above, these provisions setting forth circumstances in which the US does not intend to seek re-export or transfer authorization are consistent with US law, including the authority to provide regulatory exemptions.

(24) What is the basis in United States law for a private U.S. exporter, rather than the USG, to provide approval for third party transfers pursuant to these arrangements? Has the Department sought advice or opinion from the Justice Department regarding whether any such approvals are enforceable under United States law?

ANSWER: It is not correct to characterize the U.S. exporter as providing a USG authorization for re-transfer. This does not present a question about a private exporter's approval being enforceable under U.S. law, since the private exporter is not giving approval in lieu of USG

approval. In fact, the exemption regulation will be crafted to provide an exception from USG re-export authorization requirements for transfers of exempt items within the country among qualified persons. The relevant provisions, Article 6 of the Australia agreement and Article 3(c)(iv) of the UK agreement, serve to track retransfers among qualified persons that are otherwise excepted from USG authorization so as to assist in law enforcement activities that the U.S. might need to undertake should there be an unauthorized diversion to a non-qualified person. Furthermore, these provisions serve to protect the proprietary rights of the U.S. exporter.

UK Agreement

(25) Please describe the changes, if any, in UK law or regulation that the UK Government has agreed to make specifically in response to the U..S. proposal for an ITAR waiver (as distinct from changes that are being made in fulfillment of EU, G-8 or other UK commitments unrelated to the ITAR waiver, such as implementation of certain changes recommended by Lord Scott).

ANSWER: The UK government believes the means to accommodate the scope of its commitments under the ITAR exemption agreement is within its competence under existing law, including the recently passed Export Control Act 2002. As set forth in the MOU, the UK government will adopt certain administrative measures to implement the ITAR exemption agreement. For example we understand that the UK intends to revise its export application to include a query of exporters concerning whether the commodity in question has U.S. content and if so a requirement that proof of prior written USG consent for the re-export from the UK of the commodity be furnished. While this measure is of an administrative nature, the effect will be supported by UK criminal law since an intentional misrepresentation of the export license could be a violation of UK law that carries with it possible criminal prosecution.

(26) Does the Department have a draft of the civil contract the UK would use with qualified firms it will share with the Committee at this time? Can the Department describe any requirements it has provided, or will provide, to the UK?

ANSWER: The Department does not currently have a draft of the HMG-UK qualified company civil contract to share with the Committee at this time. That said, we expect the contract to require the qualified company to comply with the terms and conditions of a rigorous compliance regime to include most notably, binding contractual commitments regarding retransfer and end use, maintenance and provision of records and documentation, non disclosure assurances, and notification of employee composition to confirm their respective UK or Australian nationalities. A schedule of penalties for breaches of contract will also be included.

(27) Please explain the meaning of the term "UK persons and entities" and describe its legal and practical application under the proposed agreement, including in so far as it may concern access to U.S. defense items by UK citizens, UK dual-nationals, EU nationals, and other third party foreign nationals, including employees of UK entities?

ANSWER: The term "UK persons and entities" is intended to mean UK nationals, including UK corporations.

(28) Given the Parliamentary record of concern that the UK arms export process may not have a well-developed system for monitoring of its arms exports (beyond ad hoc queries to British Embassies relating to "use" for human rights monitoring purposes), please explain the basis for the Department's affirmative conclusion of comparability on this point, as well as the Department's understanding as to the scope and criteria of the DTI watch list compared with that of the United States.

ANSWER: While the UK does not have an overseas end-use program comparable to the Department's Blue Lantern program, we are advised that UK overseas posts have standing instructions to report any misuse of UK origin defense equipment so that it can be taken into account in the licensing process. Officials from HMG recently met with Department officials to gain a better understanding of the structure and costs of the Blue Lantern program and have advised that they are considering establishing their own end-use monitoring program.

We are also advised that HMG makes use of a watchlist in its export control review process. We understand that before a decision on export licenses is made, the UK Government takes into account all reliable information about end users of potential concern, including reporting from other government departments and UK posts overseas and also other external sources.

We believe the contracts with the qualified persons and especially the reporting requirements built into qualified company contracts and the new re-export prior consent provisions for US origin items built into the UK licensing system that apply to all UK exporters will contribute to enhancing the UK Government's ability to monitor US origin defense exports even more than before. At the end of the day, comparability applies to US origin items and is assessed from a regulatory perspective on the basis of those functions relating to the overall handling of U.S. origin defense items.

(29) Please explain why the UK does not plan to control export armaments manufactured in another country under UK-licensed production arrangements and how the Department factored this into its overall assessment of comparability, if it all?

ANSWER: "Comparability," a shorthand way of referring to certain statutory requirements, flows from the provision that an export control regime be at least comparable to U.S. law, regulation and policy requiring conditions on the handling of all U.S. origin defense items. This comparability is required only for U.S. origin and not necessarily for foreign origin items. That said, the UK advises that it is able to exert significant control over the supply lines on which licensed production arrangements depend.

(30) Please advise whether UK implementation of the draft agreement will include an order to revoke or amend all existing open licenses concerning the requirement to obtain U.S. Government consent to retransfers or change in use?

ANSWER: HMG has advised that the UK will amend the Open General Export Licenses at time of the implementation of

the ITAR exemption. The exemption will not come into force until we confirm that each Party has completed the necessary domestic requirements.

(31) Similarly, please advise whether the UK will publish an order to prevent incorporation of U.S.-origin defense items into dual-use end items or systems, and any related issues regarding the application of de minimus or "transformation" of technology rules that may be applicable to the preservation of United States interests?

ANSWER: UK export control law controls end products that are on the Military and Dual Use control lists and does not allow HMG to control constituent parts of any product unless they are detachable and useable separately. The UK cannot control an end product that would otherwise not be subject to export controls just because it has a controlled component embedded inside it. This restriction will not lead to the incorporation of licensed or exempt USML items into unlicensed UK civil commodities by qualified persons because we will have legally binding retransfer and end use commitments from HMG for qualified companies under contract. Non-qualified companies who are not captured under contracts, however, would violate the terms and conditions of the U.S. export license if they re-export without USG consent items incorporating licensed USML components in unlicensed UK civil commodities. This is the case today with all US licensed exports to the UK.

That said, HMG has assured us that although it will make decisions on licensability on a case-by-case basis within the parameters of existing UK law, there is flexibility within UK law to take account of genuine security and end-use concerns that could arise over specific cases.

The U.S. and UK Governments have agreed to create a Standing Joint Compliance and Implementation Forum to review and address all relevant post-Agreement export control issues.

(32) Please address whether Article 1 (a) excludes a situation where a defense item is incorporated into a

dual-use item and, therefore, subject in most instances to EU dual-use rules. If not, please explain how U.S. Government consent rights are protected.

ANSWER: The term "qualified defense item" in Article 1(a) includes those USML items that are treated as licensed dual use items under Annex IV of the EU dual use list. If a USML item is incorporated into a dual use item contained in Annex IV, the UK Government will have the authority to enforce its commitments in the MOU regarding U.S. consent rights for retransfer of that item. For other dual-use items (subject to EU regulations), the answer to question 31 applies.

(33) Also concerning Article 1(a), are there any "other instruments" in place or envisaged at this time? If so, please describe.

ANSWER: The term "other instruments" listed in Article 1(a) refers to Annex IV of the EU dual use list. Annex IV is a list of dual use items that EU member states are permitted to require licenses when exporting them even within the EU community.

(34) Since Article 2 provides for U.S. development and maintenance of a list of UK persons and entities, what is the reason for not subjecting those persons and entities to U.S. jurisdiction pursuant to a written arrangement directly with the U.S. Government (as opposed to the contractual arrangement envisaged with the UK government)?

ANSWER: In part, the point of the agreement is not to inappropriately give U.S. law extraterritorial effect, but rather to create a group of eligible persons with respect to whom the UK Government will be able to ensure compliance with export controls adopted with respect to U.S. origin defense items.

(35) Why is there no counterpart in the UK arrangement to Article 5 (a) (I) of the Australia agreement, which excludes use of general licenses and exemptions for satisfying U.s. retransfer consent?

ANSWER: HMG advises that open licenses, including Open General Export Licenses (OGELs), are central to the UK's export licensing system, which reflects its foreign and defence policy while enabling Government to focus export licensing effort on high risk cases and imposing the minimum necessary burden on business in relation to legitimate exports. HMG further advises that the terms of all OGELs are scrutinized against the UK's export control policy, including the Consolidated EU and National Criteria for Arms Exports, and its international commitments. Like any other export license, an OGEL is a legal document - a license - under which exporters are given permission to legally export goods that would otherwise be prohibited.

In the course of negotiating the re-export MOU, the UK requested that its open license system be recognized in the agreement. After thorough consultations with the UK licensing authority concerning the positive controls HMG retains over open licenses and agreement that the terms and conditions of the open licenses would be revised to reflect a requirement for UK exporters to obtain prior written consent for transfer of USML against an open license authorization, the U.S. agreed to allow inclusion of open licenses as part of the agreement.

Australia Agreement

(36) Please explain whether changes to Australia's export control laws and regulations relating to military exports will include:

(i) Control over brokering of conventional weapons and, if so, whether GOA control will extend to Australians wherever located or more closely resemble the UK approach?

ANSWER: The modifications being contemplated with regard to Australia export control laws envisions the application of controls on the activities of brokers operating within Australia.

(ii) Control over defense services relating to conventional weapons and, if so, whether the control will be as extensive as that of the United States; e.g., extend to technical assistance, as well as licensed

production; include conduct associated with publicly available information etc., or is more likely to resemble the limited approach taken by the UK in this area?

ANSWER: Australia has indicated it intends to seek legislation to allow controls over the export of defense services, as defined in the agreement's annex. (It should be noted that in the absence of an ITAR exemption agreement, it is unlikely that the GOA would seek such authority.)

(iii) Control over transfers of conventional weapons technology "by any means", or likely to be reflective of the limited approach to "intangibles" taken by the UK (e.g., e-mails, facsimile messages and reading documents over the telephone)?;

ANSWER: Australia has indicated it will seek controls on exports "by any means," along the lines of U.S. regulations. (It should be noted that in the absence of an ITAR exemption agreement, it is unlikely that the GOA would seek such authority.)

(iv) Control over all exports of goods produced in a foreign country under licensed production or manufacturing arrangements?, and

ANSWER: Australia has no plans to regulate licensed production. However, the export of tangible design data is currently controlled under Australia's export licensing regime, and as noted above in (iii) Australia will control the intangible export of design under new intangible transfer legislation.

(v) Other areas relevant to comparability?

ANSWER: We consider as noted above that comparability pertains primarily to US origin defense items and are largely satisfied by the advancements we anticipate from the GOA agreement in this respect.

(37) Given Australia's apparent decision not to control internal (i.e., in-country) transfers of defense items and since its defense industry is increasingly foreign owned or controlled (e.g., foreign acquisitions of OPTUS, Ltd. and Australian Defence Industries or "ADI"), please explain whether an ITAR waiver agreement (if approved by the Congress):

(i) could undermine some or all of the legal arrangements in place between the U.S. Government and third-country foreign firms relating to end use controls of U.S. controlled defense items?, and

ANSWER: The Government of Australia will seek legislative authority to control transfers within Australia of U.S.-origin defense items by qualified companies, as required by the agreement. (It should be noted that in the absence of an ITAR exemption agreement, the GOA would not seek such authority.) For non-qualified companies, the lack of such GOA authority will not undermine any U.S. commitments with foreign firms, as it will be the same situation that prevails today for all licensed trade.

(ii) whether the proposed ITAR agreement could be an impediment to establishing future such arrangements in the event of additional third country industry acquisitions?

ANSWER: Third country industry acquisitions have been considered as part of the Australia ITAR qualified company process. If the financial, administrative, policy, or management control of a company or unincorporated entity resides in a person of a third country, this alone will not constitute a significant risk where (i) that entity is a member of Australia's Defence Industrial Security Program, (ii) arrangements for safeguarding U.S. licensed exempt defense items have been certified by the Australia Department of Defence (ADOD), and (iii) the entity is involved in ongoing Australian defense business. It should further be noted that qualified companies must be registered in accordance with Australian corporations laws and maintain independence of action from overseas parent companies, including the right to independently decide to export defense and strategic items from Australia.

Under the terms and conditions of the Australia ITAR Qualification MOU, qualified companies are legally required to notify ADOD in writing of any material change in the information provided in the original qualification application. This notification must be submitted by the nominated senior corporate officer responsible for export control compliance within the company. Failure to submit notification of material change (e.g., foreign acquisition) is a recognized breach of the MOU and will result in ITAR exempt status disqualification. The ability of the USG to enter into licensing arrangements with the 3rd country firm, which would not automatically be eligible for "qualified firm" status by virtue of acquiring (or being a successor in interest) to a qualified Australian firm, is not affected by this agreement.

(38) Concerning Article 5 (a) (i), what incorporated items are not subject to Australian legal jurisdiction? Why are such items not excluded from the agreement?

ANSWER: The intent and meaning of this is that if any U.S. item is incorporated into any Australian items or any foreign made item over which Australia exercises jurisdiction, e.g., because it is in Australia, then the U.S. item is controlled. There is no set of U.S. items incorporated into items over which Australia can exercise jurisdiction that would not be controlled.

(39) In article 4.1.3 of the MOU concerning qualifications of Australian recipients, why does the GOA retain the sole right to revoke eligibility of a person or entity from receiving the US defense items without a license? How does such an arrangement protect U.S. interests and how is this consistent with appropriate exercise of the authority provided to the Secretary regarding suspension or revocations of licenses in section 42 of the Arms Export Control Act?

ANSWER: Australia has chosen to apply restrictions on qualified persons on the basis of statutory law and regulation, a decision we support. GOA advises that in order for such law and regulation to be upheld in Australian courts, the decision to disqualify a person under this agreement must be made by the Government of Australia and not a foreign government (i.e., the United

States). Australia can of course disqualify a company for its own purposes. If the United States wishes for a company to be disqualified, Article 4 of the MOU provides for consultation between the parties and for the suspension of the company's qualification until the matter is resolved. Considering the great extent to which the GOA shares USG security concerns, we believe it is highly unlikely that the GOA would not agree to a reasonable proposal by the USG that a company should be disqualified.

Moreover, it should be recognized that the USG retains the unilateral right (by means of US regulation) to prohibit US firms from using the ITAR exemption to export to specific companies.

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ANNEX IV

(List referred to in Article 21(1) of Regulation (EC) No 1334/2000)

The entries do not always cover the complete description of the item and the related notes in Annex I (1). Only Annex I provides the complete description of the items.

The mention of an item in this Annex does not affect the application of the provisions concerning mass-market products in Annex I.

PART I

(possibility of National General Authorisation for intra-Community trade)

Items of stealth technology

1C001	Materials specially designed for use as absorbers of electromagnetic waves, or intrinsically conductive polymers.
	NB: SEE ALSO 1C101
1C101	Materials or devices for reduced observables such as radar reflectivity, ultraviolet/infrared signatures and acoustic signatures; other than those specified in 1C001, usable in "missiles" and their subsystems;
1D103	"Software" specially designed for analysis of reduced observables such as radar reflectivity, ultraviolet/infrared signatures and acoustic signatures;
1E101	'Technology' according to the GTN for the 'use' of goods specified in 1C101 or 1D103.
1E102	'Technology' according to the GTN for the 'development' of 'software' specified in 1D103.
6B008	Pulse radar cross-section measurement systems having transmit pulse widths of 100 ns or less and specially designed components therefor;
	NB: SEE ALSO 6B108
6B108	Systems specially designed for radar cross section measurement usable for "missiles" and their subsystems;

Items of the Community strategic control

1C239	High explosives, other than those specified in the military goods controls, or substances or mixtures containing more than 2 % thereof, with a crystal density greater than 1,8 gm per cm^3 and having a detonation velocity greater than 8 000 m/s.
1E201	"Technology" according to the General Technology Note for the "use" of goods specified in 1C239.
3A229	Firing sets and equivalent high-current pulse generators, as follows ...
	NB: SEE ALSO MILITARY GOODS CONTROLS
3A232	Detonators and multipoint initiation systems, as follows ...
	NB: SEE ALSO MILITARY GOODS CONTROLS
3E201	"Technology" according to the General Technology Note for the "use" of equipment specified in 3A229 or 3A232.
6A001	Acoustics, limited to the following:
6A001.a.1.b.	Object detection or location systems having any of the following:
	1. A transmitting frequency ***below 5 kHz***;
	6. Designed to withstand ...;
6A001.a.2.a.1.	Hydrophones ... Incorporating ...

(1) The differences in the wordings/scopes between Annex I and Annex IV are indicated with bold italic text.

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6A001.a.2.a.2. Hydrophones ... Having any ...

6A001.a.2.a.5. Hydrophones ... Designed for ...

6A001.a.2.b. Towed acoustic hydrophone arrays ...

6A001.a.2.c. Processing equipment, specially designed for ***real time application with*** towed acoustic hydrophone arrays, having "user accessible programmability" and time or frequency domain processing and correlation, including spectral analysis, digital filtering and beamforming using Fast Fourier or other transforms or processes;

6A001.a.2.e. Bottom or bay cable systems having any of the following:

1. Incorporating hydrophones ... or

2. Incorporating multiplexed hydrophone group signal modules ...;

6A001.a.2.f. Processing equipment, specially designed for ***real time application with*** bottom or bay cable systems, having "user accessible programmability" and time or frequency domain processing and correlation, including spectral analysis, digital filtering and beamforming using Fast Fourier or other transforms or processes;

6D003.a. 'Software' for the 'real time processing' of acoustic data;

8A002.o.3. Noise reduction systems designed for use on vessels of 1 000 tonnes displacement or more, as follows:

b) active noise reduction or cancellation systems, or magnetic bearings, specially designed for power transmission systems, and incorporating electronic control systems capable of actively reducing equipment vibration by the generation of anti-noise or anti-vibration signals directly to the source.

8E002.a. "Technology" for the "development", "production", repair, overhaul or refurbishing (re-machining) of propellers specially designed for underwater noise reduction.

Items of the Community strategic control — Cryptography — Category 5 Part 2

5A002.a.2. Equipment designed or modified to perform cryptanalytic functions.

5D002.c.1. Only software having the characteristics, or performing or simulating the functions, of equipment specified in 5A002.a.2.

5E002 Only "technology" for the "development", "production" or "use" of the goods specified in 5A002.a.2. or 5D002.c.1. above.

Items of the MTCR technology

7A117 "Guidance sets", usable in "missiles" capable of achieving system accuracy of 3,33 % or less of the range (e.g., a "CEP" of 10 km or less at a range of 300 km), ***except "guidance sets" designed for missiles with a range under 300 km or manned aircraft.***

7B001 Test, calibration or alignment equipment specially designed for equipment specified ***in 7A117 above.***

Note: *7B001 does not control test, calibration or alignment equipment for Maintenance Level I or Maintenance Level II.*

7B003 Equipment specially designed for the "production" of equipment specified in ***7A117 above.***

7B103 "Production facilities" specially designed for equipment specified in 7A117 ***above.***

7D101 "Software" specially designed for the "use" of equipment specified in 7B003 or 7B103 ***above.***

7E001 "Technology" according to the General Technology Note for the "development" of equipment or "software" specified in 7A117, 7B003, 7B103 or 7D101 ***above.***

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7E002 "Technology" according to the General Technology Note for the "production" of equipment specified in 7A117, 7B003 and 7B103 *above*.

7E101 "Technology" according to the General Technology Note for the "use" of equipment specified in 7A117, 7B003, 7B103 and 7D101 *above*.

9A004 Space launch vehicles ***capable of delivering at least a 500 kg payload to a range of at least 300 km.***

N.B.: SEE ALSO 9A104.

Note 1: 9A004 does not control payloads.

9A005 Liquid rocket propulsion systems containing any of the systems or components specified in 9A006 ***usable for space launch vehicles specified in 9A004 above or sounding rockets specified in 9A104 below.***

N.B.: SEE ALSO 9A105 and 9A119.

9A007.a. Solid rocket propulsion systems, ***usable for space launch vehicles specified in 9A004 above or sounding rockets specified in 9A104 below,*** with any of the following:

N.B.: SEE ALSO 9A119.

a. Total impulse capacity exceeding 1,1 MNs.

9A008.d. Components, as follows, specially designed for solid rocket propulsion systems:

N.B.: SEE ALSO 9A108.c.

d. Movable nozzle or secondary fluid injection thrust vector control systems, ***usable for space launch vehicles specified in 9A004 above or sounding rockets specified in 9A104 below,*** capable of any of the following:

1. Omni-axial movement exceeding ± 5°;

2. Angular vector rotations of 20°/s or more; or

3. Angular vector accelerations of 40°/s² or more.

9A104 Sounding rockets, capable of ***delivering at least a 500 kg payload to*** a range of at least 300 km.

N.B.: SEE ALSO 9A004.

9A105.a. Liquid propellant rocket engines, as follows:

N.B.: SEE ALSO 9A119.

a. Liquid propellant rocket engines usable in "missiles", other than those specified in 9A005, having a total impulse capacity of 1,1 MNs or greater; ***except liquid propellant apogee engines designed or modified for satellite applications and having all of the following:***

1. ***nozzle throat diameter of 20 mm or less; and***

2. combustion chamber pressure of 15 bar or less.

9A106.c. Systems or components, other than those specified in 9A006, usable in "missiles", as follows, specially designed for liquid rocket propulsion systems:

c. Thrust vector control sub-systems, ***except those designed for rocket systems that are not capable of delivering at least a 500 kg payload to a range of at least 300 km.***

Technical Note:

Examples of methods of achieving thrust vector control specified in 9A106.c. are:

1. Flexible nozzle,

2. Fluid or secondary gas injection;

3. Movable engine or nozzle;

4. Deflection of exhaust gas stream (jet vanes or probes); or

5. Thrust tabs

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9A108.c.	Components, other than those specified in 9A008, usable in "missiles", as follows, specially designed for solid rocket propulsion systems:
	c. Thrust vector control sub-systems, *except those designed for rocket systems that are not capable of delivering at least a 500 kg payload to a range of at least 300 km.*
	Technical Note:
	Examples of methods of achieving thrust vector control specified in 9A108.c. are:
	1. Flexible nozzle;
	2. Fluid or secondary gas injection;
	3. Movable engine or nozzle;
	4. Deflection of exhaust gas stream (jet vanes or probes); or
	5. Thrust tabs.
9A116	Reentry vehicles, usable in "missiles", and equipment designed or modified therefor, as follows *except for reentry vehicles designed for non-weapon payloads*:
	a. Reentry vehicles;
	b. Heat shields and components therefor fabricated of ceramic or ablative materials;
	c. Heat sinks and components therefor fabricated of light-weight, high heat capacity materials;
	d. Electronic equipment specially designed for reentry vehicles.
9A119	Individual rocket stages, usable in complete rocket systems or unmanned air vehicles, capable of *delivering at least a 500 kg payload to* a range of 300 km, other than those specified in 9A005 or 9A007.a. *above.*
9B115	Specially designed "production equipment" for the systems, sub-systems and components specified in 9A005, 9A007.a., 9A008.d., 9A105.a., 9A106.c., 9A108.c., 9A116 or 9A119 *above.*
9B116	Specially designed "production facilities" for the space launch vehicles specified in 9A004, or systems, sub-systems, and components specified in 9A005, 9A007.a., 9A008.d., 9A104, 9A105.a., 9A106.c., 9A108.c., 9A116 or 9A119 *above.*
9D101	"Software" specially designed for the "use" of goods specified in 9B116 *above.*
9E001	"Technology" according to the General Technology Note for the "development" of equipment or "software" specified in 9A004, 9A005, 9A007.a., 9A008.d., 9B115, 9B116 or 9D101 *above.*
9E002	"Technology" according to the General Technology Note for the "production" of equipment specified in: 9A004, 9A005, 9A007.a., 9A008.d., 9B115 or 9B116 *above.*
	Note: For "technology" for the repair of controlled structures, laminates or materials, see 1E002.f.
9E101	"Technology" according to the General Technology Note for the "development" or "production" of goods specified in 9A104, 9A105.a., 9A106.c., 9A108.c., 9A116 or 9A119 *above.*
9E102	"Technology" according to the General Technology Note for the "use" of space launch vehicles specified in 9A004, 9A005, 9A007.a., 9A008.d., 9A104, 9A105.a., 9A106.c., 9A108.c., 9A116, 9A119, 9B115, 9B116 or 9D101 *above.*

Exemptions:

Annex IV does not control the following items of the MTCR technology:

1) that are transferred on the basis of orders pursuant to a contractual relationship placed by the European Space Agency (ESA) or that are transferred by ESA to accomplish its official tasks;

2) that are transferred on the basis of orders pursuant to a contractual relationship placed by a Member State's national space organisation or that are transferred by it to accomplish its official tasks;

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3) that are transferred on the basis of orders pursuant to a contractual relationship placed in connection with a Community space launch development and production programme signed by two or more European governments;

4) that are transferred to a State-controlled space launching site in the territory of a Member State, unless that Member State controls such transfers within the terms of this Regulation.

PART II

(no National General Authorization for intra-Community trade)

Items of the CWC (Chemical Weapons Convention)

1C351.d.4. Ricin

1C351.d.5. Saxitoxin

Items of the NSG technology

All Category 0 of Annex I is included in Annex IV, subject to the following:

— 0C001: this item is not included in Annex IV.

- 0C002: this item is not included in Annex IV, with the exception of special fissile materials as follows:

  a. separated plutonium;

  b. "uranium enriched in the isotopes 233 or 235" to more than 20 %.

- 0D001 (software) is included in Annex IV except in so far as it relates to 0C001 or to those items of 0C002 that are excluded from Annex IV.

— 0E001 (technology) is included in Annex IV except in so far as it relates to 0C001 or to those items of 0C002 that are excluded from Annex IV.

N.B.: For **0C003** and **0C004**, only if for use in a "nuclear reactor" (within 0A001.a).

1B226 Electromagnetic isotope separators designed for, or equipped with, single or multiple ion sources capable of providing a total ion beam current of 50 mA or greater.

Note: 1B226 includes separators.

a. Capable of enriching stable isotopes;

b With the ion sources and collectors both in the magnetic field and those configurations in which they are external to the field.

1C012 Materials as follows:

Technical Note:

These materials are typically used for nuclear heat sources.

b. "Previously separated" neptunium-237 in any form.

Note: 1C012.b. does not control shipments with a neptunium-237 content of 1 g or less.

1B231 Tritium facilities or plants, and equipment therefor, as follows:

a. Facilities or plants for the production, recovery, extraction, concentration, or handling of tritium;

b. Equipment for tritium facilities or plants, as follows:

1. Hydrogen or helium refrigeration units capable of cooling to 23 K (− 250 °C) or less, with heat removal capacity greater than 150 W;

2. Hydrogen isotope storage or purification systems using metal hydrides as the storage or purification medium.

1B233 Lithium isotope separation facilities or plants, and equipment therefor, as follows:

a. Facilities or plants for the separation of lithium isotopes;

b. Equipment for the separation of lithium isotopes, as follows:

1. Packed liquid-liquid exchange columns specially designed for lithium amalgams;

2. Mercury or lithium amalgam pumps;

3. Lithium amalgam electrolysis cells;

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4. Evaporators for concentrated lithium hydroxide solution.

1C233 Lithium enriched in the lithium-6 (^{6}Li) isotope to greater than its natural isotopic abundance, and products or devices containing enriched lithium, as follows: elemental lithium, alloys, compounds, mixtures containing lithium, manufactures thereof, waste or scrap of any of the foregoing.

Note: *1C233 does not control thermoluminescent dosimeters.*

Technical Note:

The natural isotopic abundance of lithium-6 is approximately 6,5 weight % (7,5 atom per cent).

1C235 Tritium, tritium compounds, mixtures containing tritium in which the ratio of tritium to hydrogen atoms exceeds 1 part in 1 000, and products or devices containing any of the foregoing.

Note: *1C235 does not control a product or device containing less than 1,48 × 10^3 GBq (40 Ci) of tritium.*

1E001 "Technology" according to the General Technology Note for the "development" or "production" of equipment or materials specified in 1C012.b.

1E201 "Technology" according to the General Technology Note for the "use" of goods specified in 1B226, 1B231, 1B233, 1C233 or 1C235.

3A228 Switching devices, as follows:

a. Cold-cathode tubes, whether gas filled or not, operating similarly to a spark gap, having all of the following characteristics:

1. Containing three or more electrodes;

2. Anode peak voltage rating of 2,5 kV or more;

3. Anode peak current rating of 100 A or more; and

4. Anode delay time of 10 µs or less;

Note: *3A228 includes gas krytron tubes and vacuum sprytron tubes.*

b. Triggered spark-gaps having both of the following characteristics:

1. An anode delay time of 15 µs or less; and

2. Rated for a peak current of 500 A or more.

3A231 Neutron generator systems, including tubes, having both of the following characteristics:

a. Designed for operation without an external vacuum system; and

b. Utilising electrostatic acceleration to induce a tritium-deuterium nuclear reaction.

3E201 "Technology" according to the General Technology Note for the "use" of equipment specified in 3A228.a., 3A228.b. or 3A231.

6A203 Cameras and components, other than those specified in 6A003, as follows:

Mechanical rotating mirror cameras, as follows, and specially designed components therefor:

1. Framing cameras with recording rates greater than 225 000 frames per second;

2. Streak cameras with writing speeds greater than 0,5 mm per microsecond;

Note: *In 6A203.a components of such cameras include their synchronising electronics units and rotor assemblies consisting of turbines, mirrors and bearings.*

6A225 Velocity interferometers for measuring velocities exceeding 1 km/s during time intervals of less than 10 microseconds.

Note: *6A225 includes velocity interferometers such as VISARs (Velocity interferometer systems for any reflector) and DLIs (Doppler laser interferometers).*

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6A226 Pressure sensors, as follows:

a. Manganin gauges for pressures greater than 10 GPa;

b. Quartz pressure transducers for pressures greater than 10 GPa.

Appendix 11

U.S. DEPARTMENT OF HOMELAND SECURITY
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE)
Office of the Press Secretary

FOR IMMEDIATE RELEASE
September 2003

Contact: Dean Boyd at ICE
Phone: (202) 616-6907

Recent Strategic Investigations by Special Agents of U.S. Immigration and Customs Enforcement (ICE)

- **U.S. Fighter Jet Components to Iran** – On Sept. 24, 2003, ICE agents in Miami announced the arrest of Serzhik Avassapian, a 40-year-old Iranian national, on charges of attempting to illegally export roughly $750,000 worth of U.S. F-14 fighter jet components to the Iranian government. During the undercover ICE investigation, there was also discussion of illegal exports of helicopters and C-130A electrical and avionic upgrades to Iran.

- **Equipment with Nuclear Applications to Pakistani Military** – On Sept. 23, 2003, Omega Engineering of Stamford, Connecticut, was sentenced to pay $313,000 in criminal fines and a $187,000 civil penalty. On Sept. 22, the Chief Financial Officer of Omega was sentenced to 5 years imprisonment and 5 years home confinement. The sentences resulted from an ICE investigation which found that Omega and its CFO had willfully disregarded the denial of an export license from the Commerce Department and illegally exported laboratory equipment with nuclear and non-nuclear applications to the Pakistani Ministry of Defense, National Development Center.

- **U.S. Fighter Jet to Colombia in Plot to Assassinate Drug Baron** – On August 31, 2003, ICE agents arrested veteran British mercenary and longtime fugitive David Brian Tomkins in Houston upon his arrival on a flight from London. As a result of an ICE probe, Tomkins had been charged in Miami in 1994 with conspiracy to violate the Arms Export Control Act in connection with a 1991 scheme to buy an A-37 fighter jet intended for use in bombing a prison that housed Pablo Escobar, the then-chief of Colombia's Medellin drug cartel. Tomkins fled the United States prior to his 1994 indictment, after being tipped off to the ICE investigation by unknown parties.

- **Shoulder-Fired Missiles Intended for Use Against U.S. Commercial Aircraft** – On August 12, 2003, agents from ICE and the FBI arrested accused British arms dealer Hemant Lakhani on charges of attempting to sell a shoulder-fired missile to individuals in the U.S. with the understanding that it would be used to shoot down an American commercial jetliner. The criminal complaint alleged that Lakhani sought to arrange the sale of at least another 50 shoulder-fired missiles to an individual posing as a member of terrorist organization in the United States. Two other individuals were charged in connection with the monetary aspects of the case.

- **Components for Missiles, Fighter Jets, and Helicopters to China** – On July 24, 2003, ICE announced the arrest and indictment of Amanullah Khan, a Pakistani

national, and Ziad Gammoh, a Jordanian national, in connection with a plot to illegally export to China components for HAWK missiles, as well as parts for U.S. military fighter jets and attack helicopters. According to the indictment, both individuals operated a business in Anaheim, California that purchased and resold military aircraft equipment to foreign commercial and government buyers.

- **Components for Missiles and Fighter Jets to Iranian Front Company** – On July 10, 2003, ICE agents executed search warrants on 18 U.S. companies in 10 states suspected of exporting military components to Multicore, Ltd., a front company in London that was involved in clandestinely procuring weapons systems worldwide for the Iranian military. Among the items allegedly exported by these U.S. companies to Multicore were components for HAWK missiles, F-14 fighter jets, F-5 fighter jets, F-4 fighter jets, C-130 military aircraft, military radars, and other equipment.

- **Components for Howitzers, Military Radars to Pakistan** – On June 12, 2003, Yasmin Ahmed and Tariq Ahmed pleaded guilty in the District of Connecticut to conspiracy to violate the Arms Export Control Act. The ICE investigation determined that the couple had purchased in the U.S. and attempted to illegally export to Pakistan parts for Howitzer canons, military radars, and armored personnel carriers. As part of this investigation, Allen Haller and his Florida-based company, Mart Haller, Inc., pleaded guilty in Connecticut on June 9 to conspiracy to illegally export military components to a Pakistani company in the United Arab Emirates.

- **"Drone" Components to Pakistan** – On May 29, 2003, ICE agents in Chicago arrested a Pakistani woman on charges of false statements in connection with the attempted export of components for unmanned aerial vehicles or "drones" to Pakistan. ICE agents determined that the woman was attempting to export these goods to an individual affiliated with the Pakistani military.

- **Assault Weapons to Colombian Guerrillas** – On May 2, 2003, Gerald Morey was found guilty after a trial by jury in the Southern District of Florida of smuggling more than 650 MAK-90 assault rifles from Florida to Colombia via Haiti and Venezuela. Several of these weapons have subsequently been seized from leftist rebel groups in Colombia, including the Revolutionary Armed Forces of Colombia (FARC).

- **Military Aircraft and Engines to Libya** – On March 26, 2003, a German pilot pleaded guilty to a 2-count indictment out of Tampa, Florida, charging him with conspiracy to illegally export engines for C-130 military aircraft and CH-47 Chinook helicopters to Libya. During the investigation, the pilot also negotiated with undercover ICE agents to buy 4 complete aircraft, two of which he said were for intended for Moammar Qadaffi's use. ICE agents arrested the pilot on Jan. 10, 2002.

- **Military Radar Components to Iran** – On March 4, 2003, the U.S. Attorney in Baltimore announced the indictment of two individuals on charges that they had attempted to illegally export from the U.S. to Iran an array of military components,

including radar detection electronics, satellite images of Tehran, and a Cobra attack helicopter. ICE agents arrested one defendant in Guam. The other remains a fugitive.

- **Satellite Technology to China** – On March 4, 2003, Hughes Electronics Corp. and Boeing Satellite Systems, Inc. entered into a civil settlement with the State Department in which the companies agreed to pay a $32 million fine, $8 million of which would go to ICE. The agreement settled charges that the firms had illegally shared sensitive satellite technology/know-how with China.

- **Missile Components to China** -- On Feb. 27, 2003, the U.S. Attorney in Los Angeles announced three separate indictments in which five individuals and four U.S. companies were indicted for attempting to illegally export components for Hawk Missiles, TOW Missiles, AIM-9 Sidewinder Missiles, F-4 Phantom fighter jets, and F-14 Tomcat fighter jets. Many of these components were bound for China. The ICE undercover investigation into these plots lasted roughly five years.

- **Military Communications Equipment to Pakistan** -- On Feb. 27, 2003, Raytheon agreed to pay $25 million to settle claims that it had attempted to illegally export troposcatter communications equipment to the Pakistani military. Raytheon agreed to pay $20 million to the ICE, $3 million to the State Department, and to invest $2 million to upgrade its internal export compliance program.

- **Fighter Jet Components to Overseas Locations** -- On Dec. 10, 2002, the U.S. Attorney in Milwaukee announced the indictment of three individuals and three U.S. companies on charges that they had attempted to illegally export components for F-4 and F-15 fighter jets, as well as parts for Sikorsky military helicopters and C-130 military aircraft. The indictment was the result of an ICE investigation.

- **Military Encryption Devices to China** -- On Oct. 18, 2002, the U.S. Attorney in Baltimore announced that two individuals had been sentenced to jail terms for conspiring to export sensitive military encryption devices to China via Singapore. The sale of these sensitive items requires approval by the National Security Agency. Both individuals were arrested by ICE agents in August 2001.

- **Military Aircraft Components to Iran** -- On July 18, 2002, an individual was sentenced in the Eastern District of New York to a jail term in connection with a scheme to export parts for 20-mm aircraft canons and other military parts to Iran via a front company in Switzerland. The individual was arrested by ICE agents in 2001.

- **Nuclear Trigger Devices to Israel** -- On April 29, 2002, an individual was sentenced to jail in the Central District of California in connection with a 1980-82 scheme to export to Israel roughly 800 krytrons, which are high-speed timing devices that can be used to detonate a nuclear warhead. The individual was arrested by authorities in Spain in July 2001 after 16 years on the run. He had been indicted in the U.S. in 1985.

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Appendix 12

United States Department of State
Washington, D.C. 20520
www.state.gov

NOV - 6

Dear Mr. Chairman:

This is in response to your letter of June 25 requesting written responses to questions concerning the Department's proposal to exempt Australia and the United Kingdom from certain license requirements of the International Traffic in Arms Regulations.

Please find the enclosed Department of Defense (DTSA) drafted munitions control list comparability study and supporting documentation. This submission answers question #9 of the June 25 HIRC UK/Australia ITAR questionnaire. With your permission, we would prefer to discuss the relationship of the UK and Australian control lists to the U.S. Munitions List directly with you and your staff. We continue to work with the Departments of Justice and Homeland Security on their responses to questions # 14, 15, 18, and 19. We look forward to the opportunity to meet with you and members of your committee as soon as possible to discuss these agreements.

Please contact us if we can be of further assistance.

Sincerely,

Paul V. Kelly
Assistant Secretary
Legislative Affairs

Enclosure:
As stated.

The Honorable
Henry J. Hyde, Chairman,
Committee on International Relations,
House of Representatives.

USML vs. UK ML Comparison Summary

In general, the United Kingdom controls nearly everything controlled by the USML by either their munitions list (ML), their dual use controls (Annex I and Annex IV), or through the MOD's Official Secrets Act. Only a very few items (e.g., several chemical items in USML Categories V and XIV) are not specifically controlled on either UK list. Most USML items that the UK controls as dual use are related to space, space launch vehicles, sounding rockets and associated components, materials, software, and technology. The majority of these items are also subject to Missile Technology Control Regime (MTCR) controls. In some cases the UK controls are stricter, subjecting items that the US considers dual use to UK munitions controls (e.g., UK ML1, UK ML6, and US Commerce Control List entries ending in "018"). The following comments summarize analysis that identified those USML items which are not controlled in the same manner on the UK ML.

UK ML has comparable controls for all items controlled by USML Categories I, III, IX (except for components), X, XVI, XX. USML Category XIX is currently "reserved" and has no entries.

UK ML has comparable controls for all items controlled by USML Category II, but controls the components only if they qualify as "specially designed." USML controls components "specifically designed or modified." The same difference applies to components listed in USML Categories IV, IX, XI, XII, and XVIII. "Specially designed" is undefined in the UK controls, but recent discussions in Wassenaar Arrangement meetings have confirmed that this includes items significantly modified for military application.

UK ML has comparable controls for USML Category IV items, except for space launch vehicles, sounding rockets and associated components and materials which are controlled as dual use. USML Category IV items that UK controls as dual use are generally also subject to MTCR controls. However, dual use sounding rockets with a maximum range (using MTCR definitions) less than 300 km are not listed in the dual use entries.

UK ML has comparable controls for most items controlled by USML Category V. Certain USML controlled explosives and fuels containing metals or alloys

Prepared by DTSA/TD, revised 15 Oct 03

(V(c)(6)(i) and (ii)) other than aluminum are controlled by the UK as dual use. UK controls do not list pyrotechnics and pyrophorics to enhance or control radiated energy in the IR spectrum, or bis-2,2-dinitropropylnitrate (BDNPN).

UK ML has comparable controls for most Category VI items. Only civil marine equipment, other than reactors, associated with nuclear propulsion (reference CCL 0A002 for description of DoS controlled items) and harbor entrance detection devices (VI(d)) are not controlled on the UK ML.

UK ML has comparable controls for Category VII items except for some "vehicles fitted with, or designed or modified to be fitted with, a plough or flail for the purpose of land mine clearance" which are specifically exempted from the UK munitions controls.

UK ML has comparable controls for USML Category VIII items except for surface effect vehicles, certain guidance and navigation equipment (when not specifically identifiable as a component for an ML item or when not specially designed for military use), and telemetry usable for UAVs but not qualifying as a specific component, which the UK controls as dual use.

UK ML has comparable controls for USML Categories XI and XII except for certain electronic equipment when not specially designed for military use (i.e., certain gravity gradiometers, radars, laser communications devices) which are controlled as dual use.

UK ML has comparable controls for USML Category XIII except for XIII(d) carbon/carbon materials, certain XIII(e) concealment and deception equipment and materials, XIII(f) energy conversion devices, XIII(g) chemiluminescent compounds, and XIII(i) metal embrittling agents. Of these, all but XIII(g) and XIII(i) are subject to UK dual use controls.

UK ML has comparable controls for most USML Category XIV items. However, O,O-diethyl S-[2(diethylamino)ethyl] phosphorothiolate and corresponding alkylated or protonated salts; methylphosphonyldichloride; and certain personal protective equipment described in XIV(f) are controlled as dual use by the UK. Ethyldichloroarsine (ED), methyldichloroarsine (MD), diphenylchloroarsine (DA), diphenylcyanoarsine (DC), Adamsite (diphenylamine chloroarsine or DM), dibromodimethylether, dichlorodimethylether, ethyldibromoarsine, bromoacetone, bromomethylethylketone, iodoacetone, phenylcarbylaminechloride, and ethyliodoacetate are not controlled on either the UK ML or dual use lists. The UK

lists also do not include the following defoliants: (1) Agent Orange (2,4,5–trichlorophenoxyacetic acid mixed with 2,4-dichlorophenoxyacetic acid); (2) LNF (butyl-2-chloro-4-fluorophenoxyacetate)

UK ML has no controls comparable to those of USML Category XV (Spacecraft Systems and Associated Equipment). UK controls spacecraft based on the payload. Payloads controlled as munitions items on the UK ML render the spacecraft subject to munitions controls. All other spacecraft and payloads are controlled as dual use. USML Category XV also controls certain "space qualified" components, inertial navigation, telemetry, radiation hardened microelectronic circuits, GPS receivers, and satellite borne communication equipment that UK controls as dual use when not specially designed for military use.

UK ML contains no specific reference to the controls of USML Category XVII (Classified Articles, Technical Data and Defense Services Not Otherwise Enumerated). However, the UK controls this same material through the UK MOD's Official Secrets Act.

UK ML has comparable controls for USML Category XVIII. However, some equipment controlled in XVIII(b) (modified for the detection or identification of, or defense against, directed energy weapons) may be controlled as dual use. UK controls all such equipment when specially designed for that purpose.

UK ML has no catch-all language comparable to USML Category XXI (Miscellaneous Articles).

UK ML controls castings and forgings as UK ML 16, production equipment as ML18, Software as ML21, and technology as ML 22. USML uses specific references within each category and elsewhere in the ITAR, but the control for these items is comparable, except where those instances noted above where the UK controls the end item as dual use.

USML vs. AS ML Comparison Summary

The Australian Munitions List (AS ML) is nearly identical to the Wassenaar Munitions List from which it is derived. In general, Australia controls nearly everything controlled by the USML by either their munitions list, their dual use controls, or through the Customs (Prohibited Exports) Regulation 13E. Only a very few items (e.g., several chemical items in USML Categories V and XIV) are not specifically controlled on either AS list. Also, as described below, most parts and components are controlled only if specially designed for military use. Most USML items that the AS controls as dual use are related to space, space launch vehicles, sounding rockets and associated components, materials, software, and technology. The majority of these items are subject to the Missile Technology Control Regime (MTCR). In some cases the AS controls are stricter, thus subjecting items that the US considers dual use to AS munitions controls (e.g., AS ML1, AS ML6, and US Commerce Control List entries ending in "018"). The following comments summarize analysis that identified those USML items which are not controlled in the same manner on the AS ML.

AS ML has comparable controls for all items controlled by USML Categories I, III, VII, IX (except for components), X, XVI, XX. USML Category XIX is currently "reserved" and has no entries.

AS ML has comparable controls for all items controlled by USML Category II, but controls the components only if they qualify as "specially designed." USML controls components "specifically designed or modified." The same difference applies to components listed in USML Categories IV, VI, VIII, IX, XI, XII, and XVIII. "Specially designed" is undefined in the AS controls, but recent discussions in Wassenaar Arrangement meetings have confirmed that this includes items significantly modified for military application.

AS ML has comparable controls for USML Category IV items, except for space launch vehicles, sounding rockets and associated components and materials which are controlled as dual use. USML Category IV items that AS controls as dual use are generally also subject to MTCR controls.

Prepared by DTSA/TD, 15 Oct 03

AS ML has comparable controls for most items controlled by USML Category V. Certain USML controlled explosives and fuels containing metals or alloys (V(c)(6)(i) and (ii)) other than aluminum are controlled by the AS as dual use. AS controls do not list pyrotechnics and pyrophorics to enhance or control radiated energy in the IR spectrum, or bis-2,2-dinitropropylnitrate (BDNPN).

AS ML has comparable controls for the vessels controlled in USML Category VI. However, components are controlled only when specially designed for military use are controlled as munitions while the USML also controls modified components. Also, civil marine equipment, other than reactors, associated with nuclear propulsion (reference CCL 0A002 for description of DoS controlled items) is not controlled on the AS ML.

AS ML has comparable controls for USML Category VIII items except for surface effect vehicles, certain guidance and navigation equipment (when not specifically identifiable as a component for an ML item or when not specially designed for military use), and telemetry usable for UAVs but not qualifying as a specially designed component, which the AS controls as dual use. As mentioned above, Category VIII components are controlled by the AS ML only when specially designed.

AS ML has comparable controls for USML Categories XI and XII except for certain electronic equipment when not specially designed for military use (i.e. certain gravity gradiometers, radars, laser communications devices) which are controlled as dual use.

AS ML has comparable controls for most of USML Category XIII except for XIII(d) carbon/carbon materials, certain XIII(e) concealment and deception equipment and materials, XIII(f) energy conversion devices, XIII(g) chemiluminescent compounds, and XIII(i) metal embrittling agents. Of these, all but XIII(g) and XIII(i) are subject to AS dual use controls.

AS ML has comparable controls for most USML Category XIV items. However, O,O-diethyl S-[2(diethylamino)ethyl] phosphorothiolate and corresponding alkylated or protonated salts; methylphosphonyldichloride; and certain personal protective equipment described in XIV(f) are controlled as dual use by the AS. Ethyldichloroarsine (ED), methyldichloroarsine (MD), diphenylchloroarsine (DA), diphenylcyanoarsine (DC), Adamsite (diphenylamine chloroarsine or DM), dibromodimethylether, dichlorodimethylether, ethyldibromoarsine, bromoacetone,

bromomethylethylketone, iodoacetone, phenylcarbylaminechloride, and ethyliodoacetate are not controlled on either the AS ML or dual use lists.

AS ML has no controls comparable to those of USML Category XV (Spacecraft Systems and Associated Equipment). AS controls spacecraft based on the payload. Payloads controlled as munitions items on the AS ML render the spacecraft subject to munitions controls. All other spacecraft and payloads are controlled as dual use. USML Category XV also controls certain "space qualified" components, inertial navigation, telemetry, radiation hardened microelectronic circuits, GPS receivers, and satellite borne communication equipment that AS controls as dual use when not specially designed for military use.

AS ML contains no specific reference to the controls of USML Category XVII (Classified Articles, Technical Data and Defense Services Not Otherwise Enumerated). However, the AS controls this same material through the Section 12 of the AS Customs Act of 1901 and the Customs (Prohibited Exports) Regulation 13E which require an export permit or license approved by the Minister of Defence, or a delegate of the Minister, for export of these items.

AS ML has comparable controls for USML Category XVIII. However, some equipment controlled in XVIII(b) (modified for the detection or identification of, or defense against, directed energy weapons) may be controlled as dual use. AS controls all such equipment when specially designed for that purpose.

AS ML has no catch-all language comparable to USML Category XXI (Miscellaneous Articles).

AS ML controls castings and forgings as AS ML 16, production equipment and technology as ML18, Software as ML21, and technology as ML 22. USML uses specific references within each category and elsewhere in the ITAR, but the control for these items is comparable, except for those instances noted above where the AS controls the end item as dual use.

REFERENCE ECCN	DESCRIPTION	USML	MTCR	Annex IV	EXEMPTIONS
0A002 (US only), 0D001, 0E001	Nuclear generating or propulsion equipment for civil/commercial marine, space, or mobile applications, along with associated software and technology	VI, XV	N/A	N/A	N/A
1A001.a & c	Seals, gaskets, sealants, fuel bladders, or diaphragms made from certain specified materials and designed for space launch vehicle or sounding rocket applications.	IV	N/A	N/A	OGEL#1 and OGEL#2 & #3 for 1A001
1A004	Chemical, biological, and radiological protective and detection equipment and components not specially designed for military use (UK ML7 controls only those "specially designed" for military use)	XIV(f)	N/A	N/A	OGEL#1; OGEL#4 for related technology, OGEL#2 &#3
1A101 (US only), 1C101 (UK version includes US 1A101 items)	Materials and devices for reduced observables such as radar reflectivity, ultraviolet/infrared signatures and acoustic signatures usable for commercial space launch vehicles, sounding rockets and UAVs	IV, VIII(h), XIII(e)	Items 17.A.1 & 17.C.1	Part 1 as 1C101	N/A
1A102, 1C102	Resaturated pyrolized carbon-carbon components or materials designed for space launch vehicles or sounding rockets capable of a range of 300 km	IV(h)	Items 6.A.2 & 6.C.4	N/A	OGEL#1 and #2 &#3 for 1C102
1C001	Materials specially designed for use as absorbers of electromagnetic waves, or intrinsically conductive polymers when modified for military applications.	XIII(e)	Item 17.C.1	Part 1	N/A
1C011, 1C111	Explosives and fuels containing metals or alloys listed in USML V(c)(6)(i) and V(c)(6)(ii) whether or not the metals or alloys are encapsulated in aluminum, magnesium, zirconium, or beryllium	V(c)(6)(iii)	Item 4.C.d and 4.C.e	N/A	OGEL#1, #2, #3
1C350	methylphosphonyldichloride	XIV(c)(5)	N/A	N/A	OGEL#2, #3

REFERENCE ECCN	DESCRIPTION	USML	MTCR	Annex IV	EXEMPTIONS
1C450	Amiton: O,O-diethyl S-[2(diethylamino)ethyl] phosphorothiolate and corresponding alkylated or protonated salts	XIV(c)(5)	N/A	N/A	OGEL#2, #3
1D103	"Software" specially designed for analysis of reduced observables such as radar reflectivity, ultraviolet/infrared signatures and acoustic signatures when not specially designed for military use.	Various, including IV, VI(g), VIII(i), XIII(k)	Item 17.D.1	Part 1	N/A
1E001	"Technology" for the "development" or "production" of items controlled by 1A001.b, 1A001.c, 1A004, 1C001, 1C101, 1C102	Various, including IV, VI(g), VIII(i), XIII(k)	Various Items	Part 2	N/A
1E101	"Technology" for the "use" of goods specified in 1A102, 1C001, 1C101 or 1D103	Various, including IV, VI(g), VIII(i), XIII(k)	Various Items	Part 1	N/A
1E102	"Technology" for the "development" of "software" specified in 1D103	Various, including IV, VI(g), VIII(i), XIII(k)	Items 6.E.1 & 17.E.1	Part 1	N/A
1E103	"Technology" for the regulation of temperature, pressure or atmosphere in autoclaves, when used for the "production" of "composites" or partially processed "composites". The control differences occur only for that technology which specifically relates to USML items that the UK controls as dual use.	Various, including IV, VI, VIII, XIII(k)	Item 6.E.2	N/A	OGEL#1 and #2 & #3
1E104	"Technology" related to the "production" of 1A102 and 1C102 items for space launch vehicles and sounding rockets	IV	Item 7.E.1	N/A	OGEL#1 and #2 &#3 for 1C102 related items only

REFERENCE ECCN	DESCRIPTION	USML	MTCR	Annex IV	EXEMPTIONS
3A001.b.1.a.4.c	"space qualified" traveling wave tubes (TWT) for greater than 31 GHz	XV(e)	N/A	N/A	OGEL#1, #5, #4 for related technology, #6, #2 &#3
3A001.b.4.b	"space qualified" microwave solid state amplifiers for greater than 31 GHz	XV(e)	N/A	N/A	OGEL#1, #5, #4 for related technology, #6
3A001.b.6	"space qualified" microwave "assemblies" for greater than 31 GHz	XV(e)	N/A	N/A	OGEL#1, #5, #4 for related technology, #6
3A001.b.8	"space qualified" traveling wave tube amplifiers for greater than 31 GHz	XV(e)	N/A	N/A	OGEL#1, #5, #4 for related technology, #6
3A001.e.1.c	"space qualified" and radiation hardened photovoltaic arrays other than those with silicon cells or having single, dual or triple junction solar cells that have gallium arsenide as one of the junctions	XV(e)	N/A	N/A	OGEL#1, #4 for related technology, #6, #2 &#3
3A001.e.1	spacecraft/satellite concentrators (referenced in CCL "related controls" no direct UK dual use entry for items not specifically described by the parameters of 3A001.e.1)	XV(e)	N/A	N/A	OGEL#1, #4 for related technology?, #6?, #2 &#3
3A001.e.1	spacecraft/satellite batteries (referenced in CCL "related controls" no direct UK dual use entry for items not specifically described by the parameters of 3A001.e.1)	XV(e)	N/A	N/A	OGEL#1, #4 for related technology?, #6?, #2 &#3
3A002.g.2	"Space qualified" atomic frequency standards defined in 3A002.g.2	XV(e)	N/A	N/A	OGEL#2 &#3
4A001	Electronic computers and related equipment, and "electronic assemblies" designed or rated for transient ionizing radiation	XV(e)	Item 13.A.1	N/A	OGEL#1, #2 &#3

REFERENCE ECCN	DESCRIPTION	USML	MTCR	Annex IV	EXEMPTIONS
4A102	"Hybrid computers" specially designed for modeling, simulation or design integration of space launch vehicles specified in 9A004 or sounding rockets specified in 9A104.	IV	Item 16.A.1	N/A	OGEL#1, #2 &#3
5A001 5A991 5E101 5E991	Telecommunications equipment for use on board satellites and associated technology.	XV(e)	N/A	N/A	OGEL#1, OGEL#5 for 5A001(b)(2), 5A001(b)(5), 5A001(c)and 5A001(d), OGEL#4 for related technology, OGEL#6, OGEL#2 &#3
5A101	Telemetering and telecontrol equipment usable for "missiles"	IV, VIII(h), XV(b), XV(e)	Item 12.A.4	N/A	OGEL#1, #2 &#3
6A001	Marine acoustic systems, equipment and specially designed components when "modified" rather than "specially designed" for military use.	VI(f)	N/A	Part 1	OGEL#2
6A002.a.1	"Space qualified" solid-state detectors	XV(e)	N/A	N/A	OGEL#1, #2 &#3
6A002.b.2.b.1	"Space qualified" imaging sensors	XV(e)	N/A	N/A	OGEL#1, #2 &#3
6A002.d.1	"Space qualified" cryocoolers	XV(e)	N/A	N/A	OGEL#1, #2 &#3
6A004.c	"Space qualified" components for optical systems	XV(e)	N/A	N/A	OGEL#1, OGEL#4 for related technology, OGEL#6, OGEL#2 &#3

REFERENCE ECCN	DESCRIPTION	USML	MTCR	Annex IV	EXEMPTIONS
6A004.d.1	Optical control equipment designed for "space qualified" optical components controlled by 6A004.c.1 or 6A004.c.3.	XV(e)	N/A	N/A	OGEL#1, OGEL#4 for related technology, OGEL#6, OGEL#2 &#3
6A007, 6A107	Gravity meters (gravimeters) and gravity gradiometers when modified rather than "specially designed" for military use.	XI(a)	Item 12.A.3	N/A	OGEL#1, #2 &#3
6A008, 6A108	Radar systems for other than ship or aircraft use when modified rather than specially designed for military use.	IV, XI	Item 11.A.1	N/A	OGEL#1, #2 &#3
6A008.j.1	"Space-qualified" "laser" radar or Light Detection and Ranging (LIDAR) equipment	XV(e)	N/A	N/A	OGEL#1, #2, #3
6D001	"Software" specially designed for the "development" or "production" of equipment controlled by 6A004.c, 6A004.d.1, or 6A008 (for those systems modified for military use).	IV, XI, XV, XII	Item 11.E.2	N/A	OGEL#1, #2 &#3
6D002	"Software" specially designed for the "use" of equipment controlled by 6A002.b.2.b.1 or 6A008.	IV, XI, XV, XII	Item 11.D.1 for softare for 6A008	N/A	OGEL#1, #2 &#3
7A003	Inertial Navigation Systems (INS) and specially designed components therefor for commercial "spacecraft".	XV(e)	Item 9.A	N/A	OGEL#1, #2 &#3
7A005	Global navigation satellite systems (i.e. GPS or GLONASS) receiving equipment, and specially designed components therefor except that specially designed for military use.	XV(e)	Item 11.A.3	N/A	OGEL#1, #2 &#3
7A007	Direction finding equipment operating at frequencies above 30 MHz and specially designed components therefor when modified for military use.	XI(b)	N/A	N/A	OGEL#1, #2 &#3
7A103	Instrumentation, navigation equipment and systems, other than those controlled by 7A003, and specially designed components therefor when designed or modified for use with commercial space launch vehicles or sounding rockets.	IV	Item 9.A	N/A	OGEL#1, #2 &#3

REFERENCE ECCN	DESCRIPTION	USML	MTCR	Annex IV	EXEMPTIONS
7A105	Global Positioning Systems (GPS) or similar satellite receivers, other than those controlled by 7A005, and designed or modified for use in commercial space launch vehicles or sounding rockets.	IV, XV	Item 11.A.3	N/A	OGEL#1, #2 &#3
7A106	7A106 Altimeters, other than those controlled by 7A006, of radar or laser radar type, designed or modified for use in commercial space launch vehicles or sounding rockets.	IV	Item 11.A.1	N/A	OGEL#1, #2 &#3
7A115	7A115 Passive sensors for determining bearing to specific electromagnetic source (direction finding equipment) or terrain characteristics, designed or modified for use in space launch vehicles or sounding rockets.	IV	Item 11.A.2	N/A	OGEL#1, #2 &#3
7A116	7A116 Flight control systems (hydraulic, mechanical, electro-optical, or electro-mechanical flight control systems (including fly-by-wire systems) and attitude control equipment) designed or modified for use in space launch vehicles or sounding rockets.	IV	Item 10.A.1	N/A	OGEL#1, #2 &#3
7A117	7A117 "Guidance sets", usable in "missiles", capable of achieving system accuracy of 3.33% or less of the range (e.g., a "CEP" of 10 km or less at a range of 300 km).	IV, VIII	Item 2.A.1.d	Part 1	N/A
7A994	7A994 Other navigation direction finding equipment, airborne communication equipment, all aircraft inertial navigation systems not controlled under 7A003 or 7A103, and other avionic equipment, including parts and components, n.e.s.	VIII, XI, XII	Item 11.A.3	N/A	No UK dual use entry, but most items are either UK ML controlled or controlled under 7A005 and 7A105.
7B001	Test, calibration or alignment equipment specially designed for equipment controlled by 7A items listed above (except 7A994). Does not include equipment for defined Maintenance Levels I or II.	IV, VIII	Item 9.B.1 10.B.1	Part 1	N/A

REFERENCE ECCN	DESCRIPTION	USML	MTCR	Annex IV	EXEMPTIONS
7B003	Inertial Measurement Unit (IMU module) testers; IMU platform testesr; IMU stable element handling fixtures; IMU platform balance fixtures; gyro tuning test stations; gyro dynamic balance stations; gyro run-in/motor test stations; gyro evacuation and fill stations; centrifuge fixtures for gyro bearings; accelerometer axis align stations; and accelerometer test stations	IV, VIII(h), XII	Item 9.B.1	Part 1	N/A
7B103	Specially designed "production facilities" for equipment controlled by 7A117.	IV, VIII	Item 9.B.1	Part 1	N/A
7D101	"Software" specially designed or modified for the "use" of equipment controlled by 7A003, 7A005, 7A115, 7A116, 7A117, 7B001, 7B003 or 7B103	IV, VIII, XV	YES	N/A	OGEL#2 &#3
7D102	Integration "software" for the equipment specified in 7A103.b; specially designed for the equipment specified in 7A003 or 7A103.a; designed or modified for the equipment specified in 7A103.c.	IV	YES	N/A	OGEL#1, #2 &#3
7D103	7D103 "Software" specially designed for modeling or simulation of the "guidance sets" controlled by 7A117 or for their design integration with space launch vehicles or sounding rockets.	IV	Item 2.D.3	N/A	OGEL#1, #2 &#3
7E001	"Technology" for the "development" of equipment or "software" specified in 7A, 7B or 7D	IV, VIII, XV	Various Items	N/A	OGEL#2 &#3
7E002	"Technology" or the "production" of equipment specified in 7A or 7B.	IV, VIII, XI, XII, XV	Various Items	Part 1	N/A
7E101	"Technology" for the "use" of equipment specified in 7A001 to 7A006, 7A101 to 7A106, 7A115 to 7A117, 7B001, 7B002, 7B003, 7B102, 7B103, 7D101 to 7D103	IV, VIII, XI, XII, XV	Various Items	Part 1	N/A
7E102	"Technology" for protection of avionics and electrical subsystems against electromagnetic pulse (EMP) and electromagnetic interference (EMI) hazards, from external sources. (Other than as controlled on the respective munitions lists).	XI(a), XI(c)	Item 11.E.1	N/A	OGEL#1, #2 &#3

REFERENCE ECCN	DESCRIPTION	USML	MTCR	Annex IV	EXEMPTIONS
7E104	"Technology" for the integration of the flight control, guidance, and propulsion data into a flight management system for optimization of rocket system trajectory (when applicable to space launch vehicles or sounding rockets).	IV	Item 10.E.2	N/A	N/A
8A001.f, 8A001.g	Surface Effect Vehicles	VIII(g)	N/A	N/A	OGEL#1, #2, #3, #4, #6
9A004	Space launch vehicles and "spacecraft"	IV	Item 1.A.1 Item 19.A.1	Part 1	N/A
9A005	Liquid rocket propulsion systems containing any of the systems or components specified in CCL ECCN 9A006 when designed for space or sounding rocket use	IV	Item 2.A.1.a Item 2.A.1.c Item 20.A.1	Part 1	N/A
9A006.a 9A006.b	Cryogenic refrigerators, flightweight dewars, cryogenic heat pipes or cryogenic systems specially designed for use in space vehicles.	XV	N/A	N/A	OGEL#1, #2 &#3
9A006.c	Slush hydrogen storage or transfer systems for space vehicles or space launch vehicles	IV,XV	N/A	N/A	OGEL#1, #2 &#3
9A006.d	High pressure (exceeding 17.5 Mpa) turbo pumps, pump components and associated gas generator or expander cycle turbine drive systems when designed for space launch vehicles or sounding rockets	IV	Item 3.A.5	N/A	OGEL#1, #2 &#3
9A006.e	High-pressure (exceeding 10.6 Mpa) thrust chambers and nozzles when designed for space launch vehicles or sounding rockets	IV	Item 3.A.3	N/A	OGEL#1, #2 &#3
9A006.f	Propellant storage systems using the principle of capillary containment or positive expulsion (i.e., with flexible bladders) when designed for space launch vehicles or sounding rockets	IV	N/A	N/A	OGEL#1, #2 &#3
9A006.g	Liquid propellant injectors, specially designed for liquid rocket engines designed for space launch vehicles or	IV	Item 3.A.5	N/A	OGEL#1, #2 &#3

ANNEX IV

(List referred to in Article 21(1) of Regulation (EC) No 1334/2000)

The entries do not always cover the complete description of the item and the related notes in Annex I[1]. Only Annex I provides for the complete description of the items.

The mention of an item in this Annex does not affect the application of the provisions concerning mass-market products in Annex I.

PART I
(possibility of National General Authorisation for intra-Community trade)

Items of stealth technology

1C001	Materials specially designed for use as absorbers of electromagnetic waves, or intrinsically conductive polymers. **N.B.: SEE ALSO 1C101**
1C101	Materials or devices for reduced observables such as radar reflectivity, ultraviolet/infrared signatures and acoustic signatures; other than those specified in 1C001, usable in "missiles" and their subsystems.
1D103	"Software" specially designed for analysis of reduced observables such as radar reflectivity, ultraviolet/infrared signatures and acoustic signatures.
1E101	"Technology" according to the GTN for the "use" of goods specified in 1C101 or 1D103.
1E102	"Technology" according to the GTN for the "development" of "software" specified in 1D103.
6B008	Pulse radar cross-section measurement systems having transmit pulse widths of 100 ns or less and specially designed components therefore. **N.B.: SEE ALSO 6B108**
6B108	Systems specially designed for radar cross section measurement usable for "missiles" and their subsystems.

Items of the Community strategic control

1C239	High explosives, other than those specified in the military goods controls, or substances or mixtures containing more than 2 % thereof, with a crystal density greater than 1.8 g/cm^3 and having a detonation velocity greater than 8000 m/s.
1E201	"Technology" according to the General Technology Note for the "use" of goods specified in 1C239.

[1] The differences in the wordings/scopes between Annex I and Annex IV are indicated with bold italic text.

3A229	Firing sets and equivalent high-current pulse generators, as follows... **N.B.: SEE ALSO MILITARY GOODS CONTROLS**
3A232	Detonators and multipoint initiation systems, as follows... **N.B.: SEE ALSO MILITARY GOODS CONTROLS**
3E201	"Technology" according to the General Technology Note for the "use" of equipment specified in 3A229 or 3A232.
6A001	Acoustics, limited to the following:
6A001.a.1.b.	Object detection or location systems having any of the following: 1. A transmitting frequency ***below 5 kHz***; 6. Designed to withstand...;
6A001.a.2.a.1.	Hydrophones...Incorporating...
6A001.a.2.a.2.	Hydrophones...Having any...
6A001.a.2.a.5.	Hydrophones...Designed for...
6A001.a.2.b.	Towed acoustic hydrophone arrays...
6A001.a.2.c.	Processing equipment, specially designed for ***real time application with*** towed acoustic hydrophone arrays, having "user-accessible programmability" and time or frequency domain processing and correlation, including spectral analysis, digital filtering and beamforming using Fast Fourier or other transforms or processes;
6A001.a.2.e.	Bottom or bay cable systems having any of the following: 1. Incorporating hydrophones..., or 2. Incorporating multiplexed hydrophone group signal modules...;
6A001.a.2.f.	Processing equipment, specially designed for ***real time application with*** bottom or bay cable systems, having "user-accessible programmability" and time or frequency domain processing and correlation, including spectral analysis, digital filtering and beamforming using Fast Fourier or other transforms or processes;
6D003.a.	"Software" for the "real time processing" of acoustic data;
8A002.o.3.	Noise reduction systems designed for use on vessels of 1000 tonnes displacement or more, as follows: b. Active noise reduction or cancellation systems, or magnetic bearings, specially designed for power transmission systems, and incorporating electronic control systems capable of actively reducing equipment vibration by the generation of anti-noise or anti-vibration signals directly to the source;
8E002.a.	"Technology" for the "development", "production", repair, overhaul or refurbishing (re-machining) of propellers specially designed for underwater noise reduction.

Items of the Community strategic control – Cryptography – Category 5 Part 2

5A002.a.2.	Equipment designed or modified to perform cryptanalytic functions.
5D002.c.1.	Only software having the characteristics, or performing or simulating the functions, of equipment specified in 5A002.a.2.
5E002	Only "technology" for the "development", "production" or "use" of the goods specified in 5A002.a.2. or 5D002.c.1. above.

Items of the MTCR technology

7A117	"Guidance sets", usable in "missiles" capable of achieving system accuracy of 3.33 % or less of the range (e.g., a "CEP" of 10 km or less at a range of 300 km), ***except "guidance sets" designed for missiles with a range under 300 km or manned aircraft.***
7B001	Test, calibration or alignment equipment specially designed for equipment specified ***in 7A117 above.*** *Note: 7B001 does not control test, calibration or alignment equipment for Maintenance Level I or Maintenance Level II.*
7B003	Equipment specially designed for the "production" of equipment specified in ***7A117 above.***
7B103	"Production facilities" specially designed for equipment specified in 7A117 ***above.***
7D101	"Software" specially designed for the "use" of equipment specified in 7B003 or 7B103 ***above.***
7E001	"Technology" according to the General Technology Note for the "development" of equipment or "software" specified in 7A117, 7B003, 7B103 or 7D101 ***above.***
7E002	"Technology" according to the General Technology Note for the "production" of equipment specified in 7A117, 7B003 and 7B103 ***above.***
7E101	"Technology" according to the General Technology Note for the "use" of equipment specified in 7A117, 7B003, 7B103 and 7D101 ***above.***
9A004	Space launch vehicles ***capable of delivering at least a 500 kg payload to a range of at least 300 km.*** **N.B.: SEE ALSO 9A104.** *Note 1: 9A004 does not control payloads.*
9A005	Liquid rocket propulsion systems containing any of the systems or components specified in 9A006 ***usable for space launch vehicles specified in 9A004 above or sounding rockets specified in 9A104 below.*** **N.B.: SEE ALSO 9A105 and 9A119.**

9A007.a. Solid rocket propulsion systems, ***usable for space launch vehicles specified in 9A004 above or sounding rockets specified in 9A104 below***, with any of the following:
N.B.: SEE ALSO 9A119.

a. Total impulse capacity exceeding 1.1 MNs;

9A008.d. Components, as follows, specially designed for solid rocket propulsion systems:
N.B.: SEE ALSO 9A108.c.

d. Movable nozzle or secondary fluid injection thrust vector control systems, ***usable for space launch vehicles specified in 9A004 above or sounding rockets specified in 9A104 below***, capable of any of the following:
1. Omni-axial movement exceeding ± 5°;
2. Angular vector rotations of 20°/s or more; or
3. Angular vector accelerations of $40°/s^2$ or more.

9A104 Sounding rockets, capable of ***delivering at least a 500 kg payload to*** a range of at least 300 km.
N.B.: SEE ALSO 9A004.

9A105.a. Liquid propellant rocket engines, as follows:
N.B.: SEE ALSO 9A119.

a. Liquid propellant rocket engines usable in "missiles", other than those specified in 9A005, having a total impulse capacity of 1.1 MNs or greater; ***except liquid propellant apogee engines designed or modified for satellite applications and having all of the following:***
1. nozzle throat diameter of 20 mm or less; and
2. combustion chamber pressure of 15 bar or less.

9A106.c. Systems or components, other than those specified in 9A006, usable in "missiles", as follows, specially designed for liquid rocket propulsion systems:

c. Thrust vector control sub-systems, ***except those designed for rocket systems that are not capable of delivering at least a 500 kg payload to a range of at least 300 km.***

Technical Note:
Examples of methods of achieving thrust vector control specified in 9A106.c. are:
1. Flexible nozzle;
2. Fluid or secondary gas injection;
3. Movable engine or nozzle;
4. Deflection of exhaust gas stream (jet vanes or probes); or
5. Thrust tabs.

9A108.c. Components, other than those specified in 9A008, usable in "missiles" as follows, specially designed for solid rocket propulsion systems:

c. Thrust vector control sub-systems, ***except those designed for rocket systems that are not capable of delivering at least a 500 kg payload to a range of at least 300 km.***

Technical Note:
Examples of methods of achieving thrust vector control specified in 9A108.c. are:
1. Flexible nozzle;
2. Fluid or secondary gas injection;
3. Movable engine or nozzle;
4. Deflection of exhaust gas stream (jet vanes or probes); or
5. Thrust tabs.

9A116 Reentry vehicles, usable in "missiles", and equipment designed or modified therefor, as follows, **except for reentry vehicles designed for non-weapon payloads**:

a. Reentry vehicles;
b. Heat shields and components therefor fabricated of ceramic or ablative materials;
c. Heat sinks and components therefor fabricated of light-weight, high heat capacity materials;
d. Electronic equipment specially designed for reentry vehicles.

9A119 Individual rocket stages, usable in complete rocket systems or unmanned air vehicles, capable of ***delivering at least a 500 kg payload to*** a range of 300 km, other than those specified in 9A005 or 9A007.a. ***above***

9B115 Specially designed "production equipment" for the systems, sub-systems and components specified in 9A005, 9A007.a., 9A008.d., 9A105.a., 9A106.c., 9A108.c., 9A116 or 9A119 ***above***.

9B116 Specially designed "production facilities" for the space launch vehicles specified in 9A004, or systems, sub-systems, and components specified in 9A005, 9A007.a., 9A008.d., 9A104, 9A105.a., 9A106.c., 9A108.c., 9A116 or 9A119 ***above***.

9D101 "Software" specially designed for the "use" of goods specified in 9B116 ***above***.

9E001 "Technology" according to the General Technology Note for the "development" of equipment or "software" specified in 9A004, 9A005, 9A007.a., 9A008.d., 9B115, 9B116 or 9D101 ***above***.

9E002 "Technology" according to the General Technology Note for the "production" of equipment specified in 9A004, 9A005, 9A007.a., 9A008.d., 9B115 or 9B116 ***above***.
Note: For "technology" for the repair of controlled structures, laminates or materials, see 1E002.f.

9E101 "Technology" according to the General Technology Note for the "development" or "production" of goods specified in 9A104, 9A105.a., 9A106.c., 9A108.c., 9A116 or 9A119 ***above***.

9E102 "Technology" according to the General Technology Note for the "use" of space launch vehicles specified in 9A004, 9A005, 9A007.a., 9A008.d., 9A104, 9A105.a., 9A106.c., 9A108.c., 9A116, 9A119, 9B115, 9B116 or 9D101 ***above***.

Exemptions:

Annex IV does not control the following items of the MTCR technology:

1) that are transferred on the basis of orders pursuant to a contractual relationship placed by the European Space Agency (ESA) or that are transferred by ESA to accomplish its official tasks;
2) that are transferred on the basis of orders pursuant to a contractual relationship placed by a Member State's national space organisation or that are transferred by it to accomplish its official tasks;
3) that are transferred on the basis of orders pursuant to a contractual relationship placed in connection with a Community space launch development and production programme signed by two or more European governments;
4) that are transferred to a State-controlled space launching site in the territory of a Member State, unless that Member State controls such transfers within the terms of this Regulation.

PART II

(no National General Authorisation for intra-Community trade)

Items of the CWC (Chemical Weapons Convention)

1C351.d.4. Ricin

1C351.d.5. Saxitoxin

Items of the NSG technology

All Category 0 of Annex I is included in Annex IV, subject to the following:

— 0C001: this item is not included in Annex IV.

— 0C002: this item is not included in Annex IV, with the exception of special fissile materials as follows:

(a) separated plutonium;

(b) "uranium enriched in the isotopes 235 or 233" to more than 20 %.

— 0D001 (software) is included in Annex IV except insofar as it relates to 0C001 or to those items of 0C002 that are excluded from Annex IV.

— 0E001 (technology) is included in Annex IV except insofar as these related to 0C001 or to those items of 0C002 that are excluded from Annex IV.

N.B.: For **0C003** and **0C004**, only if for use in a "nuclear reactor" (within 0A001.a.).

1B226 Electromagnetic isotope separators designed for, or equipped with, single or multiple ion sources capable of providing a total ion beam current of 50 mA or greater.
Note: 1B226 includes separators:
a. Capable of enriching stable isotopes;
b. With the ion sources and collectors both in the magnetic field and those configurations in which they are external to the field.

1C012 Materials as follows:
Technical Note:
These materials are typically used for nuclear heat sources.

b. "Previously separated" neptunium-237 in any form.
Note: 1C012.b. does not control shipments with a neptunium-237 content of 1 g or less.

1B231 Tritium facilities or plants, and equipment therefor, as follows:
a. Facilities or plants for the production, recovery, extraction, concentration, or handling of tritium;
b. Equipment for tritium facilities or plants, as follows:
   1. Hydrogen or helium refrigeration units capable of cooling to 23 K (-250°C) or less, with heat removal capacity greater than 150 W;
   2. Hydrogen isotope storage or purification systems using metal hydrides as the storage or purification medium.

1B233 Lithium isotope separation facilities or plants, and equipment therefor, as follows:
a. Facilities or plants for the separation of lithium isotopes;
b. Equipment for the separation of lithium isotopes, as follows:
   1. Packed liquid-liquid exchange columns specially designed for lithium amalgams;
   2. Mercury or lithium amalgam pumps;
   3. Lithium amalgam electrolysis cells;
   4. Evaporators for concentrated lithium hydroxide solution.

1C233 Lithium enriched in the lithium-6 (^{6}Li) isotope to greater than its natural isotopic abundance, and products or devices containing enriched lithium, as follows: elemental lithium, alloys, compounds, mixtures containing lithium, manufactures thereof, waste or scrap of any of the foregoing.

Note: 1C233 does not control thermoluminescent dosimeters.
Technical Note:
The natural isotopic abundance of lithium-6 is approximately 6.5 weight % (7.5 atom %).

1C235 Tritium, tritium compounds, mixtures containing tritium in which the ratio of tritium to hydrogen atoms exceeds 1 part in 1000, and products or devices containing any of the foregoing.
Note: 1C235 does not control a product or device containing less than 1.48×10^3 GBq (40 Ci) of tritium.

1E001 "Technology" according to the General Technology Note for the "development" or "production" of equipment or materials specified in 1C012.b.

1E201 "Technology" according to the General Technology Note for the "use" of goods specified in 1B226, 1B231, 1B233, 1C233 or 1C235.

3A228 Switching devices, as follows:

a. Cold-cathode tubes, whether gas filled or not, operating similarly to a spark gap, having all of the following characteristics:
   1. Containing three or more electrodes;
   2. Anode peak voltage rating of 2.5 kV or more;
   3. Anode peak current rating of 100 A or more; and
   4. Anode delay time of 10 µs or less;

   Note: 3A228 includes gas krytron tubes and vacuum sprytron tubes.

b. Triggered spark-gaps having both of the following characteristics:
   1. An anode delay time of 15 µs or less; and
   2. Rated for a peak current of 500 A or more;

3A231 Neutron generator systems, including tubes, having both of the following characteristics:

a. Designed for operation without an external vacuum system; and
b. Utilizing electrostatic acceleration to induce a tritium-deuterium nuclear reaction

3E201 "Technology" according to the General Technology Note for the "use" of equipment specified in 3A228.a., 3A228.b. or 3A231.

6A203 Cameras and components, other than those specified in 6A003, as follows:

a. Mechanical rotating mirror cameras, as follows, and specially designed components therefor:
   1. Framing cameras with recording rates greater than 225,000 frames per second;
   2. Streak cameras with writing speeds greater than 0.5 mm per microsecond;

   Note: In 6A203.a. components of such cameras include their synchronizing electronics units and rotor assemblies consisting of turbines, mirrors and bearings.

6A225 Velocity interferometers for measuring velocities exceeding 1 km/s during time intervals of less than 10 microseconds.

Note: 6A225 includes velocity interferometers such as VISARs (Velocity interferometer systems for any reflector) and DLIs (Doppler laser interferometers).

6A226 Pressure sensors, as follows:

a. Manganin gauges for pressures greater than 10 GPa;
b. Quartz pressure transducers for pressures greater than 10 GPa.

Appendix 13

U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

November 17, 2003

The Honorable Henry J. Hyde
Congress of the United States
Chairman, Committee of International Relations
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your letter dated July 16, 2003, and for your comments on the concerns I raised on the provisions of the Department of State authorization bill (H.R. 1950), which would grant concurrent criminal jurisdiction to the Federal Bureau of Investigation for violations of the Arms Export Control Act.

Since our telephone conversation and the receipt of your letter, I have engaged in discussion with the Department of Justice. We have reached a consensus that the concurrent jurisdiction is not necessary, and the FBI and the Department of Homeland Security have developed a mutually agreeable solution under existing statutory authority. I do apologize for the tardiness of my response to your letter. I am grateful for your leadership and support, and I will make sure our responses are timelier in the future.

The second issue raised by your July letter concerns the proposed exemption for munitions list items destined for the United Kingdom and Australia. I agree completely with your comment that any exemption needs to be approached with an abundance of caution and scrutinized as to any negative impact on law enforcement operations. Based upon that perspective, I have reviewed the proposed legislative exemption and the specific law enforcement requirements that are to be included in the memorandum of understanding and international agreement with the United Kingdom. These have been negotiated by the Department of State and the Department of Justice.

Based upon my understanding of the specific requirements included in the agreements with the United Kingdom and Australia, DHS has no objection to the proposed exemption for these nations. In the case of the United Kingdom, the United States Government has negotiated an agreement in which the United Kingdom has agreed that qualifying firms would be vetted by the United States before qualifying for participation in the program. Furthermore, the firm must enter into an agreement with the Ministry of Defense that requires companies to maintain and produce documents, submit to audits and in general to cooperate in preventing and investigating diversions of U.S.-origin defense items. It should be noted that firms that fail to cooperate in such a fashion

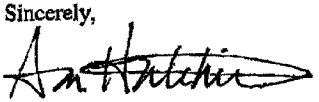
will face disqualification from using the exemption (at the sole discretion of the United States) and may be subject to civil penalties.

You also asked me to respond to question 18 from your letter to Secretary Powell. I have enclosed this response for your consideration.

Please advise if you would like to discuss this matter further.

Thank you.

Sincerely,



Asa Hutchinson
Under Secretary
Border and Transportation Security

Enc.

Question 18: In light of GAO's report concerning lessons to be learned in the Canada exemption, has the Department sought the opinion of the Department of Homeland Security ("DHS") regarding the impact of the proposed waivers on U.S. Customs' inspections responsibilities and whether there is any additional burden involved that would detract from other Customs priorities or for which additional resources by Customs will be needed? If so, please describe DHS' response. Has the Department updated its guidance to Customs concerning Canada since the GAO report?

Answer: In its response to your June 25 letter to Secretary of State Powell, the State Department indicated that the Department of Homeland Security would provide a response to your question about the impact of the proposed International Traffic in Arms Regulations (ITAR) country exemptions on Customs and Border Protection's (CBP) inspection responsibilities and limited resources. We at this time cannot quantify the specific burdens placed on CBP that the new exemptions will impose. Depending on the volume of license exempt cargo moving through each port, these proposed ITAR country exemptions could increase or significantly increase the workloads and require additional inspectors. To automate the processing of electronic export information via the Automated Export System (AES), programming changes and funding for those changes will be required. The programming changes would be used to verify those exports against the proposed ITAR country exemptions, and to target potential shipments in violation of the exemptions. Automation of the electronic export information will provide for rapid movement from the United States to the foreign destination for legitimate shipments and effective enforcement for those shipments being exported contrary to regulations. These programming changes are necessary to ensure that U.S. Munitions List commodities go to authorized end-users and do not end up in the hands of terrorists or other criminal organizations. Note, effective October 18, 2003 it became mandatory to file electronic export information (Shipper's Export Declarations) for all U.S. Munitions List shipments, including license exemptions, via AES. AES is a valuable tool for the tracking of U.S. defense exports and the enforcement U.S. export control laws, both under license and license exemption. To date, the Department has not updated its guidance to Customs concerning Canada.

Appendix 14

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

November 18, 2003

The Honorable Henry J. Hyde
Chairman
Committee on International Relations
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Hyde:

This is in response to your July 16, 2003, letter requesting the views of the Department of Justice on certain questions you sent to the Secretary of State in a letter dated June 25, 2003. Since the date of your letter, we have worked with the Department of State to clarify the precise contours of the assistance the United Kingdom is willing to provide the United States in preventing and investigating diversions of U.S. defense items controlled under our International Trafficking in Arms Regulations (ITAR).

The U.S. export control system, based on individual licenses subject to case-by-case review, has proven an effective instrument in preventing unlawful diversions. There are certainly possible risks associated with the proposed exemption process. By limiting the level of domestic controls and enforcement exercised by the United States, there is potentially less protection against undesirables, including terrorists, acquiring United States munitions list items. We have made our concerns known to the various agencies involved in crafting the exemption agreements, and they have responded by creating the regimes that limit the availability of exemptions to qualified companies - which will be vetted by the U.S. Government and can be excluded by us at any time. Indeed, the State Department has assured us that it expects the number of companies seeking U.K. qualified status to be significantly smaller than the number currently availing themselves of the Canada ITAR exemption. On balance, we believe that this set of agreements could, if appropriately implemented, adequately protect U.S. law enforcement interests. Please find below answers to those questions pertaining to the Department of Justice:

Question No. 14:

As the UK MOU on law enforcement developed by DOJ appears to rest on dual criminality as a predicate to UK cooperation, please explain how a civil contract between a UK government agency and a private British person or entity compels UK government cooperation on law enforcement matters under the arrangement?

Department of Justice Response to Question No. 14:

The contract, referred to as the "binding arrangement" in Article 3 of the License Exemption Agreement ("Agreement"), would require the qualified party to comply with U.S. law before transferring or exporting qualified U.S. origin defense items or services obtained under the exemption. The party would be obligated, under the contract, to provide records and other documents to the UK Ministry of Defence upon request. The Ministry of Defence could then provide the documents to U.S. law enforcement officials, and the State Department has recently received written assurance from the Ministry of Defence that it would do so as a matter of course, unless prevented from so doing by UK law. If the party refuses to produce the documents to the Ministry of Defence, the party may lose its "qualified status" under the Agreement and be barred from future transactions involving qualified U.S. origin defense items. Cooperation with U.S. law enforcement in the event of a breach of the contract described above is addressed not only by the contracts themselves, but also by the existing Mutual Legal Assistance Treaty between the U.S. and the UK and the Law Enforcement MOU drafted in furtherance of the Agreement. Although smuggling out of the United Kingdom may be easier because its export controls are more relaxed than those of the U.S., the act itself is still a UK violation if the ultimate destination is misrepresented to UK authorities. In such cases, not only would the MLAT apply, but the new Customs MOU would actually give us a new, more direct avenue to seek assistance of additional UK resources.

Question No. 16:

Has the State Department obtained Justice Department advice or opinion with respect to whether the contractual scheme envisaged in this arrangement presents any complications to U.S. civil enforcement actions against UK persons or entities on the grounds of strict liability, double jeopardy or otherwise?

Department of Justice Response to Question No. 16:

While not finalized, the overall contractual scheme envisaged in the Arrangement does not, in its present form, appear to present any complications to U.S. civil enforcement actions against UK persons or entities.

Question No. 19:

Given the absence of any successful record of prosecution in the United States involving illegal export activities in instances where no license was required under regulation, has the Department queried U.S. law enforcement agencies, including Justice Department and U.S. Attorneys, to determine if there are any charges (i.e., criminal counts) associated with ongoing law enforcement investigations that would be adversely affected by establishment of the waivers?

Department of Justice Response to Question 19:

The implementation of the waivers or exemptions would not immunize prior criminal conduct. Additionally, prohibitions concerning transshipment and in-country transfers would still be applicable. The only issue the Agreement raises in connection with ongoing investigations concerns UK cooperation in those cases where this is no dual-criminality. In that regard, UK cooperation would remain, as it is now, at their discretion. Moreover, it is unclear what "illegal export activities" the Committee refers to in its statement concerning the "absence of any successful record of prosecution in the United States involving illegal export activities in instances where no license was required under regulation...." If the Committee's concern is that the Agreement is somehow "immunizing" certain parties or transactions, the Agreement has no such effect. Additionally, while the Agreement alters the licensing requirements involved in applicable transactions, any illegal conduct involved in those transactions would still be subject to prosecution despite the change in the licensing requirements.

Question No. 24:

What is the basis in the United States law for a private U.S. exporter, rather than the USG, to provide approval for third party transfers pursuant to these arrangements? Has the Department sought advice or opinion from the Justice Department regarding whether any such approvals are enforceable under United States law?

Department of Justice Response to Question No. 24:

Under U.S. export control law, third party transfer is prohibited unless specifically approved prior to the transfer by the appropriate licensing official. Under Article 3(c)(iv) of the Agreement, third party transfer of any U.S. origin would be limited to other qualified parties. Consequently, a private party exporter in the U.S. would be able to give "approval" for a transfer only to a qualified party in the UK. In this regard, the exporter's "approval" is not analogous to U.S. Government approval for a third-party transfer because the qualified party has, in effect, already received U.S. Government approval to receive qualified U.S. origin defense items without a license. The notice to and approval by the U.S. exporter allows law enforcement

officials to track an item's subsequent ownership. Any exporter "approval" to make a third-party transfer to a non-qualified party would not allow a third party to transfer the item to that party without potential criminal and civil liability. Additionally, the U.S. exporter would also be subject to potential criminal and civil liability for the transfer to the unauthorized party.

Please do not hesitate to contact this office if we can provide any further information.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

cc: The Honorable Tom Lantos
Ranking Member

Appendix 15

THE SECRETARY OF STATE

WASHINGTON

November 25, 2003

Dear Mr. Chairman:

I was happy to have the opportunity to meet with you and Mr. Lantos on November 21 to discuss the UK and Australia ITAR licensing exemption agreements. Let me assure you that this Administration is fully committed to keeping U.S. weapons and technology out of the wrong hands.

Two principal issues of concern emerged from our discussion. The first is what we give up by not licensing each export transaction individually with these UK and Australian firms. It is true that under an exemption we cannot review the shippers or freight forwarders for each transaction. However, the new Automated Export System (AES) that became fully operational on October 18 requires a U.S. exporter to deposit an electronic record of all parties to an export 24 hours before shipment, including shippers and freight-forwarders, whether they are under license or an exemption. While neither a license nor the proposed exemptions can protect against unscrupulous middlemen (not all of whom are on the watchlist), AES is expected to serve as a key tool in the investigation and prosecution of these kinds of transactions. Additionally, of course, Australian and UK end-users of exempt items will have been fully vetted by U.S. and host-government authorities before they become qualified to participate under these agreements.

The second issue that we discussed was re-exports and retransfers of U.S.-origin defense items. This is a matter of major importance to the Department of State, because we are committed to ensuring that exports are limited to the end-user and end-use authorized under the ITAR. This Administration would not have begun negotiations with the UK and Australian governments had they not in the past respected the USG requirement for prior consent of re-exports to other

The Honorable
Henry J. Hyde, Chairman,
Committee on International Relations,
House of Representatives.

countries. Even the UK commitment, while politically rather than legally binding, goes far beyond anything we have obtained from the United Kingdom in the past in terms of re-exports. The Australian commitment is legally binding in this regard.

Without these agreements, the United States will have no commitment whatsoever from the Governments of Australia or the United Kingdom to control retransfers of U.S.-origin defense items within their borders. Under these agreements, qualified Australian and UK firms will now be obliged to both the USG and to their own government not to retransfer U.S.-origin defense items (either licensed or exempt) to other parties without our consent. These new controls on in-country transfers will not apply to UK and Australian companies that are not authorized to use the exemption. While we do not gain anything in such cases, we do not lose anything, either.

These agreements are a clear improvement over the status quo. For the first time, UK and Australian companies using the exemptions will be obligated by their own governments to submit to audits and inspections, maintain specific records of U.S. exports, and produce such records on both licensed and exempt transactions when we believe our laws and regulations have been violated. I want the compliance partnership relationship with UK and Australian defense trade authorities that these agreements will now give us.

Because we will not individually license many transactions with qualified companies, our licensing staff will be able to increase its focus on proposed exports to other end-users whose business practices bear closer scrutiny. The Departments of Justice and Homeland Security have reviewed and are satisfied with these arrangements. Recall also that the exemptions cannot be used for classified items or relatively sensitive categories of defense items such as small arms, items on the MTCR Annex, WMD-related items, and most night-vision devices. Furthermore, the exemptions cannot be used for any export that requires Congressional notification.

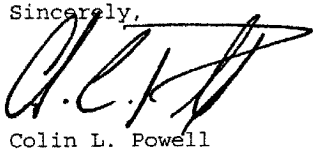
In sum, I do not see that we incur any imprudent risk with respect to controls on U.S.-origin defense items under the agreements, and the benefits are substantial in both

cases. Moreover, these agreements are the basis for a new and more significant defense cooperation relationship with two allies who, more than any other countries, have proven to share the national security and foreign policy objectives of the United States.

By requiring fewer individual licenses, we are building interoperable military forces with these key allies and, at the same time, drawing their defense industries and regulatory regimes alike closer to our own. The Administration and I strongly desire to move forward with Congressional approval as soon as possible and hope the foregoing, added to our previous correspondence, will persuade you of the same.

I very much appreciate the consideration that you and Mr. Lantos have given to these issues.

Sincerely,



Colin L. Powell

Appendix 16

One Hundred Eighth Congress

Congress of the United States
Committee on International Relations
House of Representatives
Washington, DC 20515

(202) 225–5021

http://www.house.gov/international_relations/

February 10, 2004

The Honorable Colin L. Powell
Secretary of State
U.S. Department of State
2201 C. Street, N.W.
Washington, D.C. 20520

Dear Mr. Secretary:

Thank you for your letter dated November 25, 2003, concerning State's proposal to exempt commercial exports of weapons technology to the United Kingdom and Australia, in which you expand upon your views in two areas of the several we discussed in our November 21st meeting: "what we give up," and our Government's policy and rights regarding re-exports of U.S. weapons technology.

We note that, during the meeting, there were a number of other issues we briefly discussed regarding your Department's proposal to exempt commercial exports of weapons technology from the license requirements of U.S. law. These include: (1) the Administration's failure to provide explicit assurances that would rule out additional license exemptions for other countries; (2) the inclusion of many dangerous weapons in the exemption proposal under the "low sensitivity" rubric; (3) the absence of foreign controls comparable in scope and effectiveness to those of the United States (the original rationale for these negotiations); and (4) the attenuation generally of U.S. Government safeguards and control, which also has implications for our law enforcement interests. There are also other concerns raised by your Department's proposal that the Committee will detail in the forthcoming report we mentioned during our meeting.

Mr. Secretary, we believe that agreeing to an exemption in this area would "give up" a great deal more than the ability to screen freight forwarders, although surrender of this responsibility is a serious matter *per se*. Your Department's proposal would suspend virtually the entire U.S. Government system of scrutiny and control that otherwise precedes the export of weapons technology from the United States. Suspension of the U.S. system was the approach adopted for Canada. We saw what happened there when a "who's who" of rogue governments readily exploited the lax regulatory environment to obtain U.S. weapons technology. When enacting the Security Assistance Act of 2000, well prior to 9/11, Congress explicitly cautioned the Executive Branch not to establish a "Canada-like" exemption with the United Kingdom (UK) and Australia, given the additional risks associated with unlicensed military cargo that would travel far greater distances via commercial air and sea freight. It is not obvious to us why suspending this system now makes sense in the post-9/11 security environment.

The statutory framework you would suspend requires the identification of all parties (i.e., the applicant, the freight forwarders, the intermediate consignees and the end user) on a license application for the very purpose of preventing the participation of ineligible, unreliable or suspect persons. This framework should not be so lightly discarded on the grounds that you will have improved computer tools to detect violations after they have occurred. Similarly, we are concerned on prudential grounds with the sentiment that computer checks on all parties may be dispensed with because "not all" unscrupulous middlemen are on State's computerized "watch list." This line of argument will be of little consolation if U.S. weapons are diverted through the involvement of a person known to be engaged in criminal activities, whose role was not discovered until after the fact because routine computer checks were not conducted.

Regarding the specific points you raise about the Automated Export System ("AES"), the requirement for exporters to identify freight forwarders and intermediate consignees 24 hours prior to shipment does not provide an alternative means to screen those parties. Rather, the exemption arrangements would substantially negate a critical purpose of AES coverage of weapons exports: preventing unauthorized shipments. This is because Department of Homeland Security (DHS) personnel at U.S. ports of exit would be unable to compare persons identified through AES with those already screened on an approved export license (because there is no such license). What DHS personnel will have under a best-case scenario are the names of uncleared freight forwarders and intermediate consignees identified by the exporter (which also would not be cleared), and no ability to cross-check the names against a non-existent license. When you take away the export license, you take away one of the key tools used by DHS personnel to verify compliance: You eliminate their ability to operate on the basis of near real-time, agency-wide integrated information in performance of their targeting and inspection duties. What we are "giving up" is most of our ability to effectively stop the illegal export of munitions prior to their actual shipment.

Instead, DHS personnel would be left to improvise when targeting military cargo for inspection – just as they have been with the license exemption for Canada (where State guidance to DHS has not been forthcoming despite a critical GAO report issued nearly two years ago). DHS personnel already have their hands full preventing the entry of dangerous materiel into our country. While DHS is working hard to "close the front door" to dangerous imports, State's proposals would "open the back door" to dangerous exports.[1]

The second area discussed in your letter concerns U.S. Government re-export policy, and the longstanding requirement embodied in our laws that U.S. consent be obtained before our weapons technology may be transferred to another government or used for purposes not previously authorized. We are concerned that neither of the proposed arrangements contains any commitment for the UK or Australia to seek the prior written consent of the U.S. Government

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[1] Similarly, after receiving assurance from State on July 25th that federal costs would be less, it was disappointing to learn in the waning days of our session that the proposed arrangements could *increase* or *significantly increase* the workload on DHS (depending on the volume of exempt military cargo) and require additional inspectors, as well as additional funding for AES programming changes. Since the exemption would cover "most" permanent exports to the UK and Australia (State's analysis) -- and since this could approach $3 billion per annum or 20 percent of all U.S. weapons technology licensed for permanent export worldwide -- the funding requirements could be substantial.

before they re-export or re-transfer U.S. weapons technology to a third party. The Department has suggested that the arrangements could be interpreted in order to imply this commitment, but the words are simply not there. Nor has the Department proffered that it would insist on such commitments, as it did with Canada, through an exchange of diplomatic notes. Notwithstanding this omission, the United States would be bound – in language that is very clear – not to seek third party re-export or re-transfer assurances in the future from either the UK or Australia. Since both governments now are required under U.S. law or regulation to pledge to seek U.S. Government consent prior to any re-export or retransfer on a case-by-case basis whenever there is any significant sale of U.S. weapons licensed commercially to them, and for all sales to them by the Department of Defense (and, as you point out, have consistently honored those commitments), we do not agree with your assertion that the negotiated arrangements "are a clear improvement over the status quo" and exceed anything we have obtained from the UK in the past.

In the case of Australia, the Committee has assumed this omission was an unintentional oversight, but the Department has not moved to correct this, raising concern that there may be more involved. Concerning the UK, it is extremely difficult to understand why our close ally will not extend to the U.S. Government for our controlled weapons technology the same right of prior written consent it granted in a treaty arrangement with France, Germany and other European Union (EU) partners to protect their commercial or market-sensitive information. In the same treaty, the UK also granted its EU partners – but also withheld from the United States – the right of inter-governmental consultation before authorizing re-exports by private companies to non-parties. These two principles in the treaty with the UK and its EU partners (prior consent and prior consultation before private exports are authorized) have been cornerstones of U.S. arms export control policy for many years. The Committee is concerned there could be very significant implications for U.S. re-export policy worldwide if other governments were to view the watered-down commitments State has mustered in the proposed agreements with the UK and Australia as a precedent for their own weapons dealings with us (and there is little reason to think they would not).

Your letter emphasizes that, without the exemption arrangements, the U.S. Government will continue to have no legal commitment whatsoever from these governments concerning re-transfers of U.S. weapons technology within their borders. This is so because neither government has agreed to amend its law to control such domestic re-transfers of U.S. weapons technology, one of the requirements of the Security Assistance Act of 2000. This said, the alternative approach which State negotiated in the proposed exemptions does not provide any realistic means for the U.S. to monitor or verify compliance with in-country transfer commitments, which would not be enforceable under the UK's (and likely also Australia's) criminal laws, and which, in critical respects, are reflected only in oral commitments (e.g., a prospective UK amendment of its order on general licenses) or papers the Department has not made available to the Committee (e.g., the draft contract with UK firms). Further, the ability of the State Department to audit the compliance of foreign defense industries with such commitments is, frankly, not particularly strong.

On this point, we view the trade-off you propose regarding re-exports controls and U.S. Government rights – to give up government-to-government obligations (which were not forfeited even under the Canadian exemption) in return for very limited (and essentially unenforceable) in-country re-transfer restrictions – to be an outcome that neither meets the requirements of the law

we enacted in 2000 nor serves our national interests. We believe that a requirement for legally binding government-to-government commitments on re-export controls is a *sine qua non* for the benefit of a license exemption. While we welcome the emphasis the Department places on in-country re-transfers, we also note the Department opposed provisions in H.R. 1950 earlier this year that would have clarified State's authority for such transfers in the United States and has not made any revision to its regulations since 9/11 to expand control in any area over intra-U.S. transfers of weapons technology to foreign persons as part of an overall U.S. Government response to the war on terror (e.g., domestic transfers to foreign persons of chemical and biological warfare agents).

As we said in our meeting with you, it should be no surprise, given our general views on the merits of license exemptions, that we seek explicit assurances from you that the Administration will not propose additional candidate countries for such exemptions. We seek such assurances because various infirmities with the negotiated arrangements arise precisely because the United States offer of a country exemption has not provided a "powerful incentive" (the stated rationale for the exemption policy) for these countries to strengthen their military export control systems to a level comparable in scope and effectiveness with that of the United States. This development impeaches the original justification for the exemption policy and the extension of the policy to other countries. With respect to the latter, we are troubled by the Administration's legislative request (presented when we took up the State authorization bill in April) to waive all restrictions in U.S. law for negotiating exemptions with any country, not just the UK and Australia. If these agreements are inadequate with our closest allies – as we believe they clearly are – they would be dangerous in the extreme as models for other countries. It is one thing to lower the bar for our closest allies; seeking blanket authority to lower it for any other country is beyond our comprehension.

At the very least, the Department should have put these negotiations on hold while it consulted with Congress to determine a proper course. Instead, the decision was made to wrap up the negotiations and present Congress publicly with an unsatisfactory result of requiring a new law which, if enacted, would jeopardize U.S. interests, but which, if not enacted, would disappoint our closest allies. Such an approach underestimates the importance of the underlying issues to the United States and the incalculable significance of our military ties to both countries. This is the type of dilemma – caught between cliffs and shoals – that Congress looks to the State Department to navigate away from, not to approach dangerously.

We are also concerned with the continued characterization of the U.S. weapons technology that would be exposed to increased risk of diversion as being of "low sensitivity." We think this description is misleading and does not enhance the credibility of the proposal. More accurately, the exemptions would involve a vast assortment of lethal weapons, including those that have figured prominently in past terrorist attacks, such as shoulder-fired missiles (often referred to as man-portable air defense systems, or "MANPADS"), bombs, military explosives, mortars, large caliber ammunition, flight trainers, and the like.[2] While these items may not

[2] Most of the U.S. weapons technology implicated in the ongoing criminal investigation of a London-based Iranian front company (i.e., Multicore, Ltd.) would be exempt, as would be the shoulder-fired missiles involved in the FBI's recent arrest of a UK national (and his indictment in December) on charges related to brokering the sale of these missiles to terrorists for use in shooting down commercial airliners.

present a significant technological challenge on the battlefield to our armed forces, a conventional battlefield is not where and how our enemies in the war on terror are waging their attacks. Given the experience with Canada, we are very concerned that such items could fall into dangerous hands and be used against American interests at home or abroad, or against those interests of our friends and allies, as a direct result of the reduced oversight inherent in your Department's proposal.

Certainly, President Bush did not consider such items to be of "low sensitivity" when he launched the "STAR" ("Secure Trade in the APEC Region") initiative with other APEC leaders, in which "strict export controls" over MANPADS is now one of several key elements. The Department's proposal to relax export controls over such dangerous munitions when exported to our major military ally in APEC (i.e., Australia) seems incongruous with a call by the President and other APEC leaders for strict domestic export controls. Such proposals by State reinforce the perception we underscored for you in our recent meeting that U.S. arms export control policy has become unhinged from U.S. nonproliferation and counterterrorism policy through its singular focus on export control reform initiatives conceived in the previous administration, before 9/11.

In sum, we are persuaded that the risks of diversion and exploitation of U.S. weapons technology have increased since the attacks on New York and Washington of September 11, 2001. The same weapons technology that you believe is important for interoperability purposes can as quickly and more securely be made available to our close allies by establishing priorities in our licensing processes, a step that places exports to countries that fight alongside our forces in the war on terrorism at the head of the line, licensing exports to them within a few days, rather than weeks or months. We have authorized all the resources you need to do this. Unfortunately, your Department opposes this step for reasons we do not understand, but which we suspect may relate to its reluctance to exclude exemption arrangements for other countries and to justify support for its export control reform agenda.

In this regard, State's opposition to establishing priority for the UK and Australia in our licensing process has created glaring inconsistencies in the execution of our arms export control program, and unnecessarily impedes legitimate exports by our defense industry to our closest allies. For example, it is inexplicable why approximately 850 export license applications for the UK and Australia in 2002, which would not even require a license under your proposal, required lengthy, inter-agency referral to the Department of Defense for national security reviews (according to data which State provided to the Committee last summer). Such referrals typically add four to six weeks to the process (eight days versus 48 days according to State's published time lines for fiscal year 2003). This number is made even more startling by the fact that approximately 60 percent of those licenses for the UK and Australia contained provisos (i.e., conditions and limitations) when they were eventually approved.

Since the very same weapons technology has been made available to Canadian industry without restrictions for years, the national security or foreign policy rationale for maintaining such a lengthy and onerous policy toward the UK and Australia is not readily apparent, nor is the Department's opposition to provisions in H.R. 1950 that would establish an expedited licensing process for the UK and Australia, ensuring that their exports are licensed quickly and securely. We do not understand why it is necessary to present the UK and Australia with a Hobson's choice between no license and one that takes 48 days to obtain.

Mr. Secretary, we sincerely appreciate your personal involvement in this matter. We have now met personally to discuss these issues and have traded written views touching on most of the major issues. We remain prepared to work with the State Department to achieve a resolution to these issues in the expectation that State is willing to make changes needed to protect fundamental U.S. interests and to limit its exemption policy to the UK and Australia. Thus far, we are still hopeful our concerns will be resolved.

With best wishes, we remain

Sincerely,

HENRY J. HYDE
Chairman

TOM LANTOS
Ranking Democratic Member

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